

2:15-cv-01045-RFB-BNW

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

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4 CUNG LE, et al.,)
5 Plaintiffs,) Case No. 2:15-cv-01045-RFB-BNW
6 vs.)
7 ZUFFA, LLC, d/b/a Ultimate)
8 Fighting Championship and) Las Vegas, Nevada
UFC,) Monday, March 4, 2024
9 Defendants.) 1:06 p.m.
) PRETRIAL CONFERENCE

C E R T I F I E D C O P Y

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

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APPEARANCES: See Pages 2 and 3

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COURT REPORTER: Patricia L. Ganci, RMR, CRR
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101

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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

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1 LAS VEGAS, NEVADA; MONDAY, MARCH 4, 2024; 1:06 P.M.

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3 P R O C E E D I N G S

4 THE COURT: Please be seated.

5 (Pause.)

6 COURTROOM ADMINISTRATOR: The matter now before the
7 Court is Le v. Zuffa, Inc., et al., Case Number
8 2:15-cv-1045-RFB-BNW. Counsel, please make your appearances
9 beginning with the plaintiffs.

10 MR. CRAMER: Good afternoon, Your Honor. Eric Cramer
11 for the plaintiffs.

12 MS. NOTEWARE: Good afternoon, Your Honor. Ellen
13 Noteware, also for the plaintiffs.

14 MR. SAVERI: Good afternoon. Joseph Saveri for the
15 plaintiffs.

16 MR. DELL'ANGELO: Good afternoon, Your Honor. Mike
17 Dell'Angelo for the plaintiffs.

18 MR. SPRINGMEYER: Good afternoon, Your Honor. Don
19 Springmeyer for plaintiffs.

20 MR. POMERANTZ: Good afternoon, Your Honor. Crane
21 Pomerantz for plaintiffs.

22 THE COURT: Good afternoon.

23 MR. ISAACSON: Good afternoon, Your Honor. Bill
24 Isaacson for the defendant.

25 MR. WILLIAMS: Hi, Judge. Colby Williams for the

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1 defendants.

2 MR. YATES: Afternoon, Your Honor. Chris Yates for
3 Zuffa.

4 MR. CHIU: Good afternoon, Your Honor. Aaron Chiu for
5 the defendant, Zuffa.

6 MS. PHILLIPS: Good afternoon, Your Honor. Jessica
7 Phillips for Zuffa.

8 MR. JOHNSON: Good afternoon, Your Honor. David
9 Johnson for Defendant Zuffa.

10 MR. MIRKOVICH: And good afternoon, Your Honor. Samuel
11 Mirkovich for the defendants.

12 THE COURT: Good afternoon. So we have a few things to
13 work through. My first question is where are we with the status
14 of, sort of, potential negotiations in this case, Mr. Cramer.
15 And I say this because I want to be perfectly clear about one
16 thing, which is it's very difficult for the Court to schedule
17 these types of cases. I'm not going to move the trial date,
18 unless I have a signed settlement agreement. And I'm just
19 saying that so the parties are aware of that.

20 So I sometimes have parties say to me, "We've agreed to
21 things in principle," and frequently that works out, but because
22 of the difficulty of setting this case up for trial, I just want
23 to be clear about what would be the requirement for me to move
24 the trial date as it's currently set.

25 But, Mr. Cramer, you look like you're about to say

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1 something.

2 MR. CRAMER: As we reported to Your Honor, we're
3 working with Judge Layn Phillips, the mediator, with the
4 defendant and are in discussions.

5 THE COURT: Okay. So as of now the case will be moving
6 forward, I assume, correct?

7 MR. CRAMER: Yes.

8 THE COURT: Okay. Again, I want to confirm that. And
9 so let's move through some of these motions. Now, I know that
10 the parties have not necessarily responded to the motion. So
11 what I'm going to do is I'll bring up the particular motion, and
12 the party that hasn't had a chance to file their respective
13 opposition will be able to respond. I want to get a sense of
14 some of these. Some of these I'm going to defer on, but I
15 wanted to get to some of these meatier issues right away so we can
16 deal with them, and I will figure out whether or not I need
17 further briefing as it relates to them.

18 So I want to start with Document Number 991, which is
19 Zuffa's motion to admit evidence of specific post-class period
20 market entry and expansion. Who is going to be arguing that for
21 the plaintiffs? The opposition at least.

22 MR. CRAMER: The post 2017?

23 THE COURT: Yes. So this is -- again, it's 991, and
24 this is about testimony from athletes that competed for rivals
25 outside the class period, UFC executives on post-class

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1 competition, and agents who negotiated post-class period
2 contracts, and developments of Bellator and other developments.

3 MR. CRAMER: Mr. Madden will handle that.

4 THE COURT: Okay.

5 MR. MADDEN: Thank you, Your Honor. Patrick Madden for
6 plaintiffs from Berger Montague.

7 This issue relates to the issue that we've presented to
8 Your Honor some time ago in the context of discovery, and we
9 actually lay out the bulk of our position in our own motion in
10 limine on post-class period discovery.

11 THE COURT: Right.

12 MR. MADDEN: It's our position that post-class period
13 facts and circumstances should not come in because they cannot
14 bear on Zuffa's durable monopsony power that we intend to show.
15 It's not relevant. It would be prejudicial to the jury to show
16 it to them.

17 THE COURT: So talk to me a little bit -- because this
18 does sort of blend in with this argument about, sort of, this
19 notion of, sort of, durable monopsony power. I will say that I
20 went back and looked through the expert reports from Zuffa. I
21 don't ever recall seeing, at least from our search, the word
22 "durable" being used, but it doesn't mean that the concept of
23 the reduction of output may not be something that can be used.

24 And just also so the parties know, I do anticipate at
25 our hearing, to the extent the trial does move forward, on March

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1 28th talking about issues that relate to what the experts can
2 say in terms of how they define monopsony versus how the Court
3 will define that in the context of the elements of the claim.
4 Because I think what can be very confusing to the jury is if a
5 respective expert comes up and says, "Economics doesn't
6 recognize, for example, wage share or foreclosure share," or,
7 you know, Dr. Singer saying, "Even though wages may have gone
8 up, that in and of itself doesn't necessarily mean that there's
9 not a monopsony."

10 And so I think one of the things I'm just letting you
11 all know about ahead of time is we're going to have to have a
12 conversation about how we identify to the jurors what is an
13 expert's opinion and what is the Court's determination as to
14 what needs to be demonstrated even in the context of monopsony.

15 I say that to you, Mr. Madden, because it seems to me
16 notwithstanding the fact that the term "durable" hasn't been
17 used, the principles underlying what the defendant's arguments
18 are are not things that they haven't necessarily discussed.

19 And so is it the term "durable" that you're talking
20 about, one, and then to go back as it relates to the events
21 outside of the, sort of, class period, discovery period, what is
22 your position, if anything, beyond just simply the fact that
23 this was not during that period and it shouldn't come in because
24 discovery closed?

25 MR. MADDEN: So to step back, I believe that the term

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1 "durable" comes from, in part, the case law. It's not
2 necessarily --

3 THE COURT: Right.

4 MR. MADDEN: -- the economic circumstances that
5 Dr. Singer or Dr. Topel testified to. And so what Dr. Singer
6 shows is that during this period that he analyzed wages were
7 suppressed, and nothing after that period can affect the damages
8 and the effects that were experienced by fighters during the
9 period. And the -- one of the issues that comes not just from
10 the durable monopsony power that Dr. Singer shows is a
11 completeness-of-the-record issue on things that happened after
12 2017.

13 We had this discussion in our prior briefing that you
14 would need to conduct discovery on a wide range of issues to
15 know whether anything changed because of Zuffa's conduct changes
16 or whether it is actually evidence that during the period that
17 Dr. Singer analyzed his conclusions were not valid.

18 And so we would need discovery, and we explained this
19 some months ago, in order to show, and they would need it to
20 show, that there were changes or no changes during the later
21 period that could bear on what happened in the earlier period.
22 There's no evidence in the record. There's nothing that they've
23 presented in their exhibits that would tend to show that Zuffa's
24 monopsony power could have changed afterwards in a way that
25 would indicate that there was no monopsony power during the

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1 period. And so we respectfully submit that it should be
2 excluded.

3 THE COURT: Okay. Thank you.

4 And who is going to be arguing this for Zuffa?

5 MR. YATES: Chris Yates, Your Honor, from Latham and
6 Watkins.

7 THE COURT: Mr. Yates, I have a slightly different
8 question, which is I thought I had decided this issue. How is
9 this different than me saying information can't come in outside
10 of the discovery period? Because I was clear about that in my
11 last order. So I'm trying to understand how this is different
12 assuming that, right, while you objected to the Court's order,
13 that you accept that that's the law of the case. How is this
14 different than that?

15 MR. YATES: So I think -- and we lay this out I think
16 at Page 3 of our Motion in Limine Number 1, Document 991, Your
17 Honor. Your Honor specifically said that you were not making a
18 categorical decision as to admissibility. You were making a
19 decision as to whether or not to reopen discovery in the Le case
20 and allow testimony regarding post -- post-class period issues
21 to be discovered. So there's -- that's obviously a different
22 issue than the issue of whether it should be admissible.

23 And I think one thing I would note is that Your Honor
24 made very clear, to Mr. Cramer, that the door could be opened
25 here. And the door's been opened --

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1 THE COURT: Well, let me ask you a question.

2 I think the door can be opened to an expert opining. I
3 don't think the door can be opened to facts that were not part
4 of discovery. So that's two separate things. So what I want to
5 focus on are those two separate things.

6 MR. YATES: Sure.

7 THE COURT: There's a discussion about durable
8 monopsony power, and that's why I say we'll have that discussion
9 when we get closer to trial, because that term may be something
10 that wasn't used. But that idea is actually certainly a part of
11 what it means to have a monopsony. I would certainly allow the
12 defendants to talk about that as relates to reduced output or
13 increased output, as the case may be, in terms of the number of
14 fights, for example.

15 But that's different than facts coming in and facts
16 that were relied upon by either expert post-class period. So
17 tell me about, are you going to be seeking to admit
18 post-discovery facts that were not disclosed or are you simply
19 saying if they open the door to this we want to be able to argue
20 about certain facts that we are aware of later?

21 MR. YATES: So certainly we would -- we are seeking
22 through our Motion in Limine Number 1 to have, for example,
23 Zuffa executives talk about what has happened in the marketplace
24 since the middle of 2017. Similarly, we want to ask questions
25 of the fighter plaintiffs about their careers post 2017. All of

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1 that bears on the issues. And, frankly, I think that's going to
2 be challenging for the jury to sit there and try to
3 compartmentalize things in time and just focus on this one
4 particular time period when they all know that the marketplace
5 has been evolving since 2017.

6 So we're seeking to admit it, but I'll also say the
7 door has been opened. If you look at Page 5 of our brief, right
8 in the middle, the plaintiffs have included videos from after
9 the class period. They've included articles from after the
10 class period. They've included fight rankings from after the
11 class period.

12 So, you know, what's good for the goose is good for the
13 gander, and they have opened that door.

14 THE COURT: Well, I haven't admitted it. So, I mean,
15 the door typically is opened, as you know, Mr. Yates, when I
16 admit something or an expert testifies to it. You actually
17 anticipated a question I was going to ask the plaintiffs'
18 counsel about this.

19 But it sounds to me like what you're saying is if
20 they've opened this door, we should be able to allow these sort
21 of facts in. Because I will say this, from my perspective, the
22 testimony described would be precluded by my previous order
23 absent them opening the door to this. So any testimony about
24 what happened post 2017 by any executives, by any witness, I
25 would exclude whoever presented that witness.

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1 But I would leave, and I continue to leave, the
2 possibility open that if there is testimony that would open the
3 door to that, that's something that could be discussed at the
4 time. Because as I think about it now, certainly there could be
5 some limited discussion, but it's hard to see that when we don't
6 have the trial testimony.

7 But let me ask them about the particular articles,
8 Mr. Yates. If you had one other point, you can go ahead.

9 MR. YATES: I did. I just wanted to -- I just wanted
10 to address the expert point for a moment, Your Honor, because I
11 think Your Honor's absolutely right. I mean, the word "durable"
12 does not appear in Professor Topel's report, as an example. And
13 that's because, as Mr. Madden suggested that, you know,
14 that's -- that comes from the jury instruction in many ways.

15 THE COURT: Right.

16 MR. YATES: And it comes from the *Rebel Oil* case and
17 other cases. But the concept is certainly in there because all
18 the concept means is you got to look at the marketplace and you
19 got to understand entry, whether there are barriers to entry,
20 whether competitors are coming in, which is obviously what
21 Dr. Topel discusses.

22 So I think no expert should be using words like
23 "durable monops" -- "durable" or other words that are in the
24 jury instructions because I think that's going to confuse the
25 jury.

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1 THE COURT: Right.

2 MR. YATES: And so hopefully we can -- we can work that
3 out.

4 I will say, I didn't -- I didn't -- I don't believe
5 with respect, Your Honor, that you categorically decided the
6 issue of post-class period discovery. You were ruling on a
7 motion to reopen. I accept that Your Honor denied the motion to
8 reopen, but you said you would revisit the issues, you know,
9 essentially closer to trial and while looking at whether or not
10 the plaintiffs had opened the door. But we certainly believe
11 that the jury will be confused and it will be prejudicial to
12 Zuffa if we cannot present evidence or ask the fighter
13 plaintiffs questions about their careers post 2017.

14 THE COURT: Okay. Thank you.

15 MR. YATES: Thank you.

16 THE COURT: Are you switching up, Mr. Cramer?

17 MR. CRAMER: Yes, Your Honor. I wanted to make some
18 points, if you don't mind.

19 THE COURT: Well, I don't mind. The only issue is,
20 again, what Mr. Yates said, what's good for the goose is good
21 for the gander. If I'm not allowing post period --
22 post-discovery information to come in and post-class period
23 information to come in that wasn't disclosed during discovery, I
24 wouldn't allow it for anyone. So talk to me a little bit about
25 some of these other exhibits that have been identified that the

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1 plaintiffs are putting forward.

2 MR. CRAMER: They were put forward by mistake. We've
3 already pulled, I think, one of them. Anything else past -- we
4 tried to make sure that there was no article, document, or
5 anything past June 2017. Some may have fallen through, but we
6 do not intend to introduce any evidence post June 2017
7 affirmatively --

8 THE COURT: Okay.

9 MR. CRAMER: -- about facts or circumstances.

10 THE COURT: Okay. All right.

11 MR. CRAMER: The only other point I would make is
12 Dr. Singer shows monopsony power from 2010 to 2017. He then put
13 in a supplemental declaration that Your Honor reviewed as part
14 of the motion to reopen discovery that showed that Zuffa's
15 monopsony power continued and even rose to the present.

16 Zuffa never countered that. So the only evidence we
17 have about the current situation after June 2017 is that the
18 monopsony power continued and increased. That's the only
19 evidence there is.

20 So if they tried to bring in evidence through
21 executives, through anecdotes, that will be totally out of
22 context. There's no expert testimony to deal with it, and it
23 would be highly prejudicial given that the experts are going to
24 be testifying through June 2017.

25 THE COURT: Thank you.

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1 Well, I'm going to be -- I'm going to be consistent
2 with my prior ruling, which is I'm not going to allow either
3 side to bring in any testimony, evidence, that is post 2017 as I
4 previously ruled. So I'm going to deny that --

5 MR. CRAMER: Thank you, Your Honor.

6 THE COURT: -- motion.

7 Now, I also want to then go to this motion as it
8 relates to witnesses, and I'm not sure who's going to be arguing
9 the opposition to that for the defense. I'll come back to you,
10 Mr. Cramer.

11 MR. YATES: That will be me, Your Honor, if I can just
12 get to my notes.

13 THE COURT: Sure. I'm sorry. I know I'm skipping
14 around, Mr. Yates, so take your time.

15 MR. SAVERI: Excuse me, Your Honor. Joseph Saveri. Is
16 this Number 1?

17 THE COURT: This relates to -- there was two categories
18 of witnesses that were objected to, these sort of undisclosed
19 and late-disclosed witnesses, right --

20 MR. SAVERI: Right.

21 THE COURT: -- by the plaintiffs. And I want to hear
22 more from the defendant about the nature of the disclosure and
23 the timing of the disclosure.

24 MR. SAVERI: Thank you.

25 THE COURT: So, Mr. Yates, just I want to clarify. As

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1 I understand it, the defendants have now disclosed the content
2 as relates to what the testimony would be. Is that right?

3 MR. YATES: Certainly there -- the witnesses are listed
4 in our -- in our trial witness list, and they were also listed
5 in supplemental disclosures at the end of last year. And they
6 were also disclosed by plaintiffs. Some of them were disclosed
7 by plaintiffs going back to 2015. Others were the subject of
8 RFAs. This is discussed in our trial brief, and I'll find the
9 pages to point Your Honor to.

10 THE COURT: Right. But, Mr. Yates, you are aware of
11 the case law that says disclosure by one party as to a witness
12 doesn't necessarily mean the other party doesn't have to also
13 identify that witness and the information to which they will be
14 testifying.

15 And so my question to you is, why the delay?

16 MR. YATES: I -- Your Honor, I don't really think there
17 was a delay. The witnesses were known to the plaintiffs. If
18 Your Honor looks at Rule 26(e) and if you look at the Advisory
19 Committee notes to Rule 26(e), what they say is that if -- if a
20 witness is disclosed or otherwise known to the other side, then
21 that witness is disclosed for purposes of trial.

22 Here, the plaintiffs listed multiple witnesses on
23 their -- their own disclosures. They then asked for documents
24 to be produced from those -- from some of those witnesses. We
25 produced those documents. And then most remarkably to me, you

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1 know, they purport to represent the fighter plaintiffs and, yet,
2 they want to exclude testimony of fighters who they knew about
3 who they asked Zuffa RFA's about. And, you know, this trial
4 should be about let's hear from the fighters. Let's hear --
5 let's hear from the fighters beyond the curated set of named
6 plaintiffs that they have brought forward. Let's hear from the
7 other fighters here.

8 You know, what -- this also relates to --

9 THE COURT: I have this question for you, Mr. Yates --

10 MR. YATES: Sure.

11 THE COURT: -- which is, as far as you're concerned,
12 when you say that these fighters or these witnesses were known,
13 was the nature of what they were going to testify about known?
14 Because that actually is different. Because it's certainly one
15 thing to say we both have a person on our witness list where the
16 person's known to the opposing party. The question is, from
17 your perspective is the information that they're going to
18 testify about information that you believe that the plaintiffs
19 were aware they would testify about, and if so, can you point to
20 where in the record you believe that it demonstrates that?

21 MR. YATES: Sure. I mean, the plaintiffs asked about
22 fighters and agents in depositions. And Rule 26(e) makes very
23 clear that that is sufficient disclosure that makes -- makes
24 witnesses otherwise known.

25 And so that -- that --

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1 THE COURT: So can you give me an example -- I'm trying
2 to pull up my list here. Can you give me an example of a
3 witness from that list where you believe what they were going to
4 testify about and there possibly being witnesses was known to
5 the plaintiffs? I'm just trying to get to my list here.

6 MR. YATES: Sure. I mean, let me ... an example would
7 be Mr. Ratner.

8 THE COURT: Can you spell that for the record.

9 MR. YATES: R-A-T-N-E-R.

10 So Mr. Ratner was the Vice President of Regulatory
11 Affairs for Zuffa during the class period. The plaintiffs
12 identified him on their initial disclosures. The plaintiffs
13 asked for documents from Zuffa. Documents were -- I think 20 or
14 30,000 documents were produced by Zuffa. Mr. Ratner, if I
15 recall correctly, was discussed by name in depositions. And
16 Rule 26(e) and the Advisory Committee notes to Rule 26(e) make
17 clear that that is sufficient -- that is sufficient to -- to
18 identify the witness and provide disclosure to the witness
19 because --

20 THE COURT: Well, what is he going to be testifying
21 about?

22 MR. YATES: He's going to be testifying about
23 regulatory affairs.

24 THE COURT: Okay. That doesn't -- Mr. Yates, that
25 doesn't give me information. So when you say "regulatory

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1 affairs" --

2 MR. YATES: Sure.

3 THE COURT: -- give me an example of what you mean by
4 that?

5 MR. YATES: Sure. I mean, Zuffa's efforts to get MMA
6 legalized.

7 THE COURT: Okay.

8 MR. YATES: Sorry if I used a shorthand, Your Honor.

9 THE COURT: Well, no, there are different types of
10 regulations.

11 MR. YATES: Sure, that's fair.

12 THE COURT: And so I wasn't sure -- I mean, there are
13 other regulations that Zuffa -- that were seeking to comply
14 with. So is it just that aspect of them seeking to get
15 licensed? And anything else? Because that seems like that's
16 fairly straightforward, and so I'm a little confused why there
17 would be some dispute about that.

18 MR. YATES: Oh, I think there's a big dispute. I mean,
19 I think that part of our defense on -- on monopsony power -- and
20 this goes exact -- goes right to the jury instruction on
21 monopsony power, is that Zuffa was -- Zuffa was essentially
22 first. It created -- it created the industry and, therefore, we
23 naturally had a first mover advantage. But that first mover
24 advantage took a lot of effort. And the jury should hear from
25 Mr. Ratner and others, Mr. Fertitta, Mr. White, about the

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1 efforts, the efforts to get MMA legalized, including in New York
2 where the first MMA fight that was legal took place right at the
3 end of the class period.

4 THE COURT: Okay. And from your perspective this is
5 information that was known as it relates to the nature of this
6 testimony, for example, for Mr. Ratner by the plaintiffs?

7 MR. YATES: Your Honor, they had -- they had 20 or
8 30,000 documents from Mr. Ratner. They knew all about him. And
9 if you look at our trial brief, this is I think discussed at
10 Pages 50, 51, and continues onto 56. But if you look at Page
11 51, Your Honor, it talk -- we quote Rule 26(e) and we quote the
12 Advisory Committee notes there which say that, you know, if
13 you -- if you -- you can make someone known during the discovery
14 process as when a witness not previously disclosed is identified
15 during the taking of a deposition.

16 So this goes far beyond someone who's identified during
17 the taking of a deposition. This is a witness who was on the
18 plaintiffs' -- the plaintiffs' initial disclosure, which we
19 incorporated. We expressly incorporated the plaintiffs' initial
20 disclosures, and then we produced -- we produced tens of
21 thousands of documents from that witness's files. There can be
22 no debate that they knew all about Mr. Ratner.

23 THE COURT: So I just want to make sure that as I go
24 through this list, is it your position that all of these
25 witnesses were known under Rule 26(e) to the plaintiffs?

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1 MR. YATES: Yes. Absolutely.

2 THE COURT: And of those witnesses, which of them, like
3 Mr. Ratner, had -- were referenced in a deposition and/or had
4 documents provided about them? I want to make sure that I have
5 them.

6 MR. YATES: So, Your Honor, we go through -- we go
7 through and discuss the witnesses in detail in our trial brief
8 at Pages 52, 53, 54, 55 --

9 THE COURT: Hold on. Let me pull it up.

10 MR. YATES: -- and 56. Yeah. Please do.

11 (Pause.)

12 THE COURT: And, I'm sorry, Pages 50 -- you said start
13 at 50?

14 MR. YATES: 52. The legal argument begins I believe on
15 Page 50, Your Honor, but Your Honor was asking about witnesses
16 and the witnesses are discussed at Pages 52 through 56.

17 THE COURT: Got it. Hold on.

18 (Pause.)

19 THE COURT: Okay. Thank you, Mr. Yates. Let me let
20 the plaintiffs respond to that. Then I may bring you back up.
21 Thank you.

22 MR. CRAMER: Thank you, Your Honor.

23 There are 1,200 fighters in the class. We identified
24 123 witnesses on our disclosures. There are dozens of managers.
25 Zuffa has dozens of employees. And we had a limited number of

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1 depositions that we were allowed to take, including a limited
2 number of Zuffa witnesses. So we were highly constrained, and
3 what we focussed on were Zuffa's initial disclosures and other
4 disclosures during the case. They were supposed to identify
5 those people who supported their claims and defenses. That's
6 the entire purpose of the disclosures.

7 None --

8 THE COURT: Well, Mr. Cramer, let me ask you this
9 question, which is there are necessarily going to be witnesses
10 on these lists for whom there are not depositions. And the
11 parties had to make strategic choices about whom to depose and
12 whom to pursue further. To the extent that these witnesses were
13 known and a choice was made, why would that prevent them from
14 calling these particular witnesses? What aspect in terms of
15 their testimony --

16 MR. CRAMER: They believe --

17 THE COURT: -- was related to a, sort of, late enough
18 disclosure that it is prejudicial to the plaintiffs?

19 MR. CRAMER: Well, all of these people were disclosed
20 for the first time by Zuffa more than five years after the close
21 of discovery, basically months before trial. A third of their
22 witness list, 13 of their witnesses, were not disclosed during
23 the fact discovery period. Zuffa should have and could have
24 disclosed them. They did not -- they did not say what issues
25 those people were going to testify about or what they were

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1 knowledgeable about.

2 THE COURT: So let me ask you -- I'm sorry, Mr. Cramer.
3 I thought they have since done that.

4 MR. CRAMER: Well, they did that with respect to a few
5 of those within the last month, but we don't have the ability to
6 take depositions. Depositions are closed. We have now a third
7 of their witnesses they -- this is trial by ambush, Your Honor.
8 They did not put any of these people on their disclosures. We
9 took the depositions of the people that they disclosed.

10 For example, Mr. Yates says that Mr. Ratner is going to
11 testify about licensing or regulations, but he also referenced
12 Fertitta and White. Well, those are witnesses that they put on
13 their list who are on our trial list who can testify about those
14 issues. They should be restricted to the people that they
15 identified that we focussed on that we took the depositions of
16 because they were -- they identified these people as the people
17 who -- who they were going to use to -- for their claims and
18 defenses.

19 And Your Honor referenced a case and we cited it in our
20 brief, the *Shenwick* case, which says it's not enough that a
21 witness is on the plaintiff's -- the opposing party's
22 disclosures. We disclosed 123 people. And the case says: "To
23 now hold that the opposing party were supposed to know which of
24 these potential witnesses might be valuable to the
25 late-disclosing party and, therefore, deserving of the opposing

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1 party's discovery responses would both penalize the opposing
2 party for their efforts to provide an inclusive disclosure and
3 disregard the purpose behind Rule 26. The opposing party should
4 not have to guess which of these potential witnesses to focus
5 their energies on when the late-disclosing party knows which
6 ones are material."

7 So this is a late-disclosing party. They know which
8 are material. It's their duty and burden under Rule 26 to
9 disclose them. The discovery period went on for years, and they
10 did not disclose them.

11 THE COURT: So, Mr. Cramer, just again for the record I
12 believe you had identified. When did you first receive
13 information about what would be the substance of their
14 testimony?

15 MR. CRAMER: With respect to several of them, it was
16 their trial brief. So with respect to -- they disclosed in
17 December 2023. They disclosed eight of them. With respect to
18 five of them, they disclosed them for the first time in their
19 trial brief. So December 2023, meaning basically a few months
20 before trial. That's the first time they disclosed them.
21 Discovery is closed, five years later. This is trial by ambush.

22 We had strict deposition limits. And it's really
23 unfair to -- we focussed our discovery on what the defendants
24 were supposed to do. They were -- defendant was supposed to
25 tell us who was going to support their claims and defenses in

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1 this case.

2 And on some of these people they even fought us about
3 even producing the documents and producing the information. One
4 of the people -- and they're also Zuffa's employees. They knew
5 about these people. If these people were going to be people who
6 were -- they were going to put up at trial in this case, they
7 should have told us about them. And now they're putting
8 managers and they're putting fighters on this list. There are
9 1,200 fighters in the class. If they had some that were going
10 to testify in support of Zuffa, it was incumbent upon them to
11 tell us so that we can then use the discovery period to take the
12 deposition and get the discovery.

13 Right now with respect to most of these 13, we have no
14 deposition. We have no documents. And we're six weeks or five
15 weeks from trial. It's just -- it's really unfair that a third
16 of their witness list -- bless you -- is made up of people who
17 they just added at the last minute.

18 And, Your Honor, we think it's trial by ambush. And we
19 think it's unfair and it violates the rules -- the Ninth Circuit
20 rules and Rule 26(a) and the intent of the initial disclosure
21 and the disclosure process.

22 THE COURT: Thank you, Mr. Cramer.

23 MR. YATES: May I respond briefly, Your Honor?

24 THE COURT: Yes, you can, Mr. Yates.

25 So I guess my question, Mr. Yates, is, why not disclose

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1 them? I mean, there's no reason that I can see that these
2 witnesses shouldn't have been disclosed earlier. I don't really
3 understand why you're relying upon Rule 26(e) in this context
4 when these witnesses have information that appears to be
5 straightforward and consistent with what your defense has always
6 been. But there are -- as Mr. Cramer said, there are lots of
7 potential witnesses in this case. You all did have a limited
8 number of depositions you could take. So why weren't they
9 identified earlier?

10 MR. YATES: So, Your Honor, let me just start by
11 beginning, this is not trial by ambush. These are people that
12 they disclosed. Mr. Cramer put them on his witness list. They
13 asked for documents about them. We incorporated their
14 disclosures expressly by reference. That is disclosure.

15 But, more importantly, Rule 26(a) has to be read in
16 harmony with Rule 26(e). They are --

17 THE COURT: You're not actually answering my
18 question --

19 MR. YATES: I apologize.

20 THE COURT: -- which is just -- I appreciate what your
21 argument is. That's why I asked Mr. Cramer those questions.

22 It seems straightforward. Rule 26 does require
23 disclosure of witnesses which relates to their relevant
24 information. And the reason why them identifying it isn't
25 enough, as the case law says, is they have to know why you're

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1 calling these witnesses because you could be calling them for a
2 very different reason.

3 So that doesn't change the fact that Rule 26 is fairly
4 clear and the purpose of it is to allow for this type of
5 information to be disclosed. Why wasn't it disclosed?

6 MR. YATES: So -- because we relied on Rule 26(e), Your
7 Honor. Because Rule 26(e) says that if a witness is made
8 otherwise known in discovery, then you do not need to supplement
9 your Rule 26(a) disclosures.

10 And if Your Honor looks at the cases that begin on the
11 bottom of Page 51 of our trial brief, you got a case from the
12 District of Arizona denying motion to strike where a witness's
13 identity was included in the moving party's own responses to
14 initial -- the initial disclosures. That's exactly what we're
15 relying on here.

16 The next case, the *Mann* case from the Central District
17 of California, they're referenced extensively in expert reports.
18 The same is true here. These fighters are named and they're
19 named in the expert reports of Dr. Singer and Dr. Topel.

20 The *Coach* case, also from the Central District of
21 California. The witnesses were conspicuously mentioned in
22 produced documents. And, again, if you go back to the -- if you
23 go back to the language of Rule 26(e), even if the witness is
24 just identified in a deposition, that is sufficient disclosure.

25 And on this notion of trial by ambush, the plaintiffs

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1 took the depositions of 10 people who are not on our initial
2 disclosures. They went far beyond the people who are on our
3 initial disclosures, and they disclosed Mr. Ratner or
4 Mr. Lambert. Mr. Lambert, he submitted a declaration in this
5 case as part of discovery.

6 The declaration obviously is what he's going to testify
7 about. But the most important thing here I think, Your Honor,
8 you know, the managers. Managers were disclosed on the
9 plaintiffs' initial disclosures.

10 And they were then mentioned in discovery and they were
11 mentioned in depositions. They were mentioned in documents that
12 were part of expert reports and the like. And then you get the
13 fighters. And the fighters -- they purport to represent these
14 fighters. We can't talk to them. So that's part of the reason
15 we can't talk to them. There's a certified class. We can't
16 talk to them.

17 And so -- but those fighters -- we answered dozens and
18 dozens of RFAs about the fighters. They knew all about them.
19 They knew exactly who these people are. And, Your Honor, this
20 trial should be about the actual facts, not the curated facts
21 from a couple of handpicked, disgruntled fighters who lost more
22 than they won. We should be hearing from the people -- the
23 fighters of the UFC who -- who did well, and we should be
24 looking at their contracts.

25 They've also objected to close to 100 fighter contracts

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1 saying they're hearsay or not authentic. We'll get to that,
2 but, you know, this trial should be about what fighters actually
3 experienced, not the named plaintiffs and what they -- they
4 didn't even experience anything -- what they claimed to have
5 heard in the ether.

6 THE COURT: Okay. Thank you.

7 MR. YATES: Thank you.

8 THE COURT: Just give me a moment, Mr. Cramer. I'm
9 just looking up one thing here.

10 (Pause.)

11 (Court conferring with law clerk.)

12 THE COURT: So there's one thing that I want to look up
13 before I make a decision about this. So I'm just going to defer
14 on this for now, but you'll have my answer later today. Let's
15 move on.

16 So we have a few others here. We also have in that
17 same -- I'm sorry -- in that same document -- we're going to go
18 back and we'll try to go back to these documents in order at
19 least as relates to them for each of the different parties. The
20 motion in limine by Zuffa to preclude evidence of threats or
21 coercion outside of the class period or preclude evidence of
22 pre-class period acquisitions and preclude evidence of dividends
23 paid prior to the class period.

24 I'm sorry. Who's going to be arguing this for the
25 plaintiffs?

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1 MR. CRAMER: I am.

2 THE COURT: So I go back to this, my saying what's good
3 for the goose is good for the gander. Are you planning on
4 offering any of this, Mr. Cramer?

5 MR. CRAMER: Your Honor, yes. Our case is a continuing
6 scheme that began in 2004 or 2005, and it's been that way from
7 the very beginning. Zuffa argues --

8 THE COURT: So hold on a second. So let me make sure
9 in terms of what you are going to be arguing outside of the
10 class period.

11 Which aspects -- let's start with threats or coercion
12 outside of the class period and tell me exactly what the nature
13 is of what you want to be able to present on that.

14 MR. CRAMER: What we want to be able to present is that
15 Zuffa engaged in a scheme involving contracts, acquisitions, and
16 coercion, including threats, that began in 2003 or 2004 and as a
17 scheme continued through 2017. And Zuffa and we -- and that's a
18 continuing scheme. And Zuffa argued on the motion to dismiss
19 that everything that happened before four year before we filed
20 should be out, and Your Honor said, no, it's a continuing
21 scheme. The -- we're only seeking damages for the effects of
22 that scheme within the limitations period.

23 THE COURT: So let me ask, you are you seeking anything
24 post 2000 -- to include information post 2017?

25 MR. CRAMER: Nothing post 2017. We are seeking to

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1 include the acquisitions that Your Honor said both in the motion
2 to dismiss and the motion for summary judgment and the class
3 order were part of the continuing scheme, the contracts and the
4 coercion. All of that built up from 2004 to 2005 through 2017.
5 And Dr. Singer studies the foreclosure share and as it rose
6 during the period -- during the acquisitions and then during the
7 period and relates that foreclosure share to a declining wage
8 share. And that's been our case since the very beginning.

9 And this is Zuffa's effort to once again relitigate a
10 question that they've lost on the motion to dismiss, they lost
11 at class, and they lost at summary judgment. It's a continuing
12 scheme. Your Honor's ruled it was a continuing scheme. We're
13 not going past 2017. We are not seeking damages outside of the
14 class period, but we are seeking to show that there was a scheme
15 that began before the class period involving contracts and
16 coercion and acquisitions, and that scheme then had an effect
17 within the class period because it helped them maintain and grow
18 their monopsony power. And then they used and abused that
19 monopsony power to continue the scheme during the class period
20 and then reduce the pay of the fighters.

21 And that's been our case since 2014 and Zuffa's been
22 attacking it since 2015. Your Honor's upheld it since 2014.
23 And this is a case of if you -- you know, they're just trying to
24 make the same argument that they lost time and time again.

25 THE COURT: I just wanted to clarify, though. So

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1 there's nothing post 2017?

2 MR. CRAMER: Correct, nothing.

3 THE COURT: Okay. All right. Thank you, Mr. Cramer.

4 MR. CHIU: Your Honor, Aaron Chiu, Latham and Watkins.

5 I'll respond to this one.

6 Just as Mr. Cramer is up here saying that post-2017
7 evidence is not relevant to a class that is limited to from 2010
8 to 2017, as you said, what is good for the goose is good for the
9 gander.

10 THE COURT: But there's separate issues, though, which
11 I think one is I had ruled previously about post 2017 because
12 the discovery had closed. That's one of the reasons why I
13 wasn't allowing that. This is not an area where there's not
14 been some discovery and discussion.

15 My other question to you is, if you're going to be
16 arguing about the durability of monopsony, how is this not
17 relevant as relates to evidence that is actually during the
18 period? Because your experts also looked at the same period.
19 They looked at the reports. And so this is a slightly different
20 circumstance in terms of the issue of the discovery cut-off.
21 And in particular, if you're going to be arguing about the
22 durability, why isn't this issue relevant also in terms of the
23 buildup to the -- the potential buildup to monopsony power in
24 terms of what the plaintiffs are going to be arguing?

25 MR. CHIU: Well, if durable -- if the plaintiffs'

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1 theory is that durable monopsony power -- Zuffa held durable
2 monopsony power in the class period and had the effect -- and,
3 recall, the damages they're seeking is limited to the class
4 period and the effect of that alleged monopsony power is limited
5 to that class period. They should be able to show that within
6 the class period the -- the evidence that they have of Zuffa's
7 conduct and alleged monopsony power in the class period was
8 enough for it to exert monopsony pricing power, which is what
9 leads to the damages.

10 I will also respond on the continuing violations
11 exception. Yes, Your Honor ruled on that at the motion to
12 dismiss stage. That's a pleadings question at that point in
13 time. But what the continuing violations doctrine actually
14 establishes is it allows plaintiffs to actually bring in
15 evidence and seek damages from what is actually a continuing
16 violation.

17 The case law that they cited and what they try to rely
18 on is that they try to say there was a scheme here. Well, their
19 trial brief and what we've seen in the evidence that they intend
20 to introduce at trial does not actually establish that all of
21 these components were done in concert. And that's why actually
22 in the case law it's very clear that, for example,
23 pre-limitations period acquisitions, the continuing violations
24 doctrine does not actually apply to acquisitions that have
25 happened long ago.

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1 The *Google* case that they cite in their motion actually
2 goes against them. That was also a pleadings stage decision.

3 And the Court there said that, "Look, the plaintiffs didn't" --

4 THE COURT: Counsel, let me ask you this one question.

5 I guess I want to make sure I'm understanding what you would be
6 objecting to. And, I'm sorry, it's Mister?

7 MR. CHIU: Chiu.

8 THE COURT: Chiu. So, Mr. Chiu, it certainly seems to
9 me that there's some necessity of the plaintiffs, sort of, at
10 least describing the history of how Zuffa got to where it is.
11 And it doesn't sound like to me you're objecting to that. I
12 want to try to figure out what is your objection exactly. I
13 mean, they can't just start 2010 without talking about when
14 Zuffa was started, sort of, some history which I think would be
15 allowable.

16 Can you tell me where you think they're going to move
17 beyond that? Because I would certainly allow that, but tell me
18 where they're going to cross the line where you feel like this
19 is more than they should be permitted to bring in. Do you
20 understand my --

21 MR. CHIU: Correct. I think in our -- in our Motion in
22 Limine Number 2 we have identified examples of
23 pre-limitations -- pre-class period evidence of alleged coercion
24 and threats. These are one-off examples of alleged threats by
25 Zuffa to fighters, conduct like that to which there is no

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1 connection through other evidence as some part of overarching
2 scheme by Zuffa to amass monopsony power in those years of
3 one-off things, right. There's no -- there's no evidence in
4 this case that, you know, there was some grand plan hatched --

5 THE COURT: What about the contracts? Because what I
6 want to focus on in my questioning here is about contracts and
7 the nature of the contracts. Because that's a central part of
8 their argument. And certainly that's a central part of why the
9 Court allowed the case to move forward was that there's at least
10 an allegation as to the restrictive nature of the contracts.

11 MR. CHIU: The contracts, Your Honor?

12 THE COURT: What's that?

13 MR. CHIU: The contracts, is that --

14 THE COURT: Yeah, the contracts.

15 MR. CHIU: Well, I think our position would be, well,
16 if their whole theory is that these contracts and the terms are
17 so exclusive as to give Zuffa enough power to foreclose the
18 number of fighters in the marketplace, why wouldn't the
19 contracts during the class period be the most relevant to
20 establishing whether in that period Zuffa had the power and the
21 effect of that was to cause damages to the fighters? I mean,
22 that's really -- the idea that you would need pre-limitations
23 period contracts to demonstrate the acquisition of power when
24 they can rely on the evidence of the contracts during the class
25 period --

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1 THE COURT: Well, how would they show -- Mr. Chiu, they
2 would have to be able to show to some extent, Mr. Chiu, like,
3 how they got to where they are. I mean, again, I'm not saying
4 that I would allow for, sort of, one-off examples of coercion
5 because I'm not sure -- unless the door's opened with testimony.

6 But certainly they have to be able to argue as you all
7 are going to be able to argue, "Look, we built up this business.
8 We built it up with our acumen." Can they say, well,
9 conversely, they built up a business and part of that was based
10 upon these contracts? I mean, it seems to me that it would be
11 confusing to the jury as if you just start with 2010 and you are
12 sort of plopped in the middle, right --

13 MR. CHIU: Well --

14 THE COURT: -- of a market. You all are going to argue
15 and I would let you argue similarly, right, "We started this
16 with a small amount of money. We used our business acumen to
17 build it, right. We do things uniquely and specially," right.
18 That's part of your argument which I will allow you to do for
19 that same period of time, right. And in fact some of the
20 witnesses that you all want me to allow, right, are going to say
21 exactly that, right.

22 So why wouldn't they be able to say, well, look, as
23 part of them building up this business, it wasn't just built on
24 their acumen; it was built on other aspects of it? I mean, if
25 I'm going to allow you to do that, why wouldn't I allow them to

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1 do that as a way to oppose that argument?

2 MR. CHIU: I think the distinction there, though, is
3 that currently the way their damages model and their expert
4 has -- their expert opinion on damages is not actually linked to
5 any of the pre-limitations period conduct, right. They're
6 talking about contracts during the -- during the class period
7 that they say foreclosed fighter share and allowed Zuffa to
8 price super competitively to underpay fighters. It's really
9 about the contracts and it's really -- and that is what when you
10 look at the continuing violations exception -- in true
11 continuing violations cases, what -- what a plaintiff is trying
12 to do is they're trying to say, look, there was a continuing
13 harm that started outside of the limitations period and
14 continued to cause damages and injury.

15 Here, Dr. Singer's whole model is really modeling
16 damages that flow from these so-called exclusive contracts
17 during the class period. They're seeking class period damages.
18 There's nothing that really connects it to these one-off
19 instances of pre-limitations period conduct.

20 THE COURT: So you don't think it's relevant if these
21 contacts were being used prior to the class period as a way to
22 build up, for example, market share? There's a whole question
23 the jury has to deal with, sort of, the market dominance and how
24 the defendant may or may not have established that. And so --
25 okay.

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1 (Defense counsel conferring.)

2 THE COURT: So, Mr. Chiu, my only concern is that I
3 think it would be confusing to the jury not to hear some history
4 and context. I have to look at to what extent I would limit
5 that, but both sides are going to be arguing that from different
6 perspectives. And it sounds as if you want them not to discuss
7 certain aspects of the use of these contracts which has been a
8 part of their argument from the beginning. And I'm just not
9 sure how that balances with you all being able to talk about the
10 entire history of Zuffa as it develops business and the business
11 acumen used to develop the business, which, again, I'm going to
12 allow you to do that from 2004 -- from the beginning of Zuffa.

13 I will allow you to say this started wherever, maybe
14 started in the basement, however you want to describe that. I'm
15 going to allow you to go through that. So I'm just not sure how
16 this isn't allowing them to do something that's, sort of,
17 similar, but on the opposite side of that argument?

18 MR. CHIU: Yeah, I mean, I think the issue comes back
19 to they are trying to introduce pre-limitations period and
20 pre-class period conduct and argue and introduce -- you know,
21 argue that that was part of this continuing anticompetitive
22 scheme. And there's just no evidence tying that -- you know,
23 their class period damages to that conduct. It's not only not
24 how the continuing violations exception works; it would also be
25 prejudicial.

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1 I think it's a question if there's dueling evidence
2 about, oh, how did we build up our business? Through
3 innovation, right, through business acumen. And they want to
4 say, "Well, look, along the way there are other things that
5 we -- we dispute that," but I think where it goes too far is the
6 way they're trying to use this pre-limitations period evidence
7 and clearly saying that it's part of some grander
8 anticompetitive scheme when that would have been fine at the
9 pleading stage, but we're at trial now. And we haven't seen any
10 evidence actually linking those what are otherwise benign acts,
11 right, threats -- alleged threats, coercion. They are not part
12 of some grand scheme. They haven't connected it. Their damages
13 model --

14 THE COURT: When you say "they haven't connected it,"
15 I'm a little confused by that because --

16 MR. CHIU: Well, if you look at the --

17 THE COURT: -- I mean, they've made an argument
18 throughout where they have said this was a part of the way that
19 they enforced the contract. This is what they did --

20 MR. CHIU: Well, saying it is a part of a scheme and
21 actually having evidence of all of these elements being taken --

22 THE COURT: Well, I've already found that they've
23 presented cognizable evidence of their position without ruling
24 on whether that's correct or not, right. That's not my role,
25 right. I've already written a fairly large order that says that

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1 there were certain tactics that were used to help reinforce
2 these restrictive contracts allegedly based upon the evidence
3 that was presented. Why is that not -- what they're asking for
4 not consistent with that?

5 I'm trying to understand how this is different, right,
6 than what the Court found to be a pattern sufficient for the
7 case to go to trial, right, during the class period.

8 MR. CHIU: Well, again, I think it comes back to -- and
9 I would encourage Your Honor to go back and look at, you know,
10 even the Google case that they cite, and if you look at the
11 continuing violations doctrine, it's really about a situation
12 where you have pre-limitations period conduct for which they're
13 seeking continuing injury and damages. And that's not what
14 they're doing here. This is really focussed about the
15 contracts, not the pre-limitations period, one-off acts of
16 alleged coercion, or even the acquisitions.

17 THE COURT: Well, here's what I don't understand. They
18 have a specific model for damages, whether or not I agree with
19 it or not, right, for the class period. So I'm not sure how
20 you're arguing --

21 MR. CHIU: Yeah, but those are linked to the contracts.

22 THE COURT: What I'm saying to you is there is a
23 difference between them arguing, which I wouldn't let them
24 argue, "Well, we should be compensated for damage that occurred
25 outside the class period" versus saying "There's no doubt about

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1 the fact that this particular alleged conduct started before the
2 class period and it continued into the class period and you can
3 see the pattern that's here." I mean, the continuing violations
4 doctrine certainly allows that. It doesn't allow for parties to
5 be compensated, right, for that.

6 And so I guess what I'm trying to understand is the
7 distinction that you're making between them being permitted
8 under the continuing violations doctrine to be able to point to
9 pre-class-period conduct, on the one hand, and then, on the
10 other hand, it sounds like you're saying that they're trying to
11 seek damages for that. And if you're asking me to limit that,
12 I'm happy to do that, but I thought their model was focussed on
13 the class period. So I'm not sure that they're seeking to use
14 that for damages outside the class period.

15 MR. CHIU: I think you're right -- I think you're
16 right, Your Honor, that their damage -- their model is limited
17 to damages within the class period, but our point is that
18 Singer's model does not actually attempt to estimate damages
19 from the pre-limitations period acquisitions or all these things
20 they say are part of the scheme. It's limited to the contracts.

21 And so from that perspective what they're trying to
22 do -- and that's why the continuing violations doctrine does not
23 apply here. The continuing violations doctrine is used in cases
24 where the violation is biased nature continuing and there's
25 continue -- continues to accrue injury and damages. And they're

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1 trying to bootstrap prior limitations conduct so they can seek
2 damages within the limitations period. That just doesn't apply
3 in this case because ultimately the damages they're seeking for
4 the class is limited to the period and from the contracts that
5 are in the class period.

6 THE COURT: Okay. Thank you.

7 MR. CHIU: Yep.

8 THE COURT: Mr. Cramer?

9 MR. CRAMER: Your Honor, first of all, they are wrong
10 about Dr. Singer's model. Dr. Singer's model uses variation
11 both before the class period between foreclosure share and wage
12 share and carries that variation through the class period. And
13 that variation of foreclosure share and its relationship to wage
14 share begins at the beginning of the model.

15 I mean, we had discovery in this case from 2004. We
16 have contracts back from 2004. This case has always gone back
17 that far. This is not a surprise. Half of Your Honor's class
18 order is about the acquisitions and other conduct that occurred
19 in advance of the class period.

20 Zuffa is going to be arguing that Zuffa grew to be a
21 dominant force through its own ingenuity and its own great
22 promotion. And what our case has been from the beginning is
23 that that is not true, is that there is a scheme involving
24 acquisitions, contracts, and coercion, and those three things
25 worked together. The acquisitions -- what happened was they

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1 bought the rival. Then they took the good fighters from the
2 rival and brought them into the UFC, adding them to the UFC's
3 contracts, and then shut down the rival and then coerced those
4 people to stay within the UFC.

5 And so all three aspects of that scheme worked together
6 beginning in 2004. And then in 2006 when they bought WEC and
7 WFA and 2008 when they bought Affliction and shut it down, and
8 then in 2010 when they bought Strikeforce and shut it down, each
9 time they took the fighters from those entities into the UFC,
10 built the contract -- put the -- increased their share of the
11 overall foreclosure, right. And so their foreclosure share grew
12 because they would shut down a rival and add top fighters to
13 their -- to their stable of fighters. And the foreclosure share
14 grew. And that scheme continued from 2004 and 2005 into the
15 class period.

16 That's how Dr. Singer's model worked. That's what he's
17 talked about since the beginning of the case, and that's been
18 our case since the beginning. And as they recognize, Your
19 Honor's motion to dismiss already found that that was a
20 continuing scheme. And we've proven over and over and over
21 again that that is exactly how the scheme worked as Your Honor
22 found in the class order.

23 So we're only seeking damages within the class period,
24 but Zuffa built -- our story is Zuffa built up its monopsony
25 power through contracts, coercion, and acquisitions beginning in

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1 the early days and then into the class period. And that's the
2 nature of our case. That's what we're going to tell the jury.
3 And that's what Your Honor found in your -- in the class order.

4 Thank you.

5 THE COURT: Well, I'm going to deny these motions as
6 relates to this information. I'm going to allow both sides to
7 be able to bring in information as it relates to the class --
8 pre-class period. I'm going to allow Zuffa to be able to argue
9 that it developed its position based upon its business acumen
10 and its theories of promotion. And I'm going to allow the
11 plaintiffs to be able to argue that conversely that this was a
12 position -- a dominant market position built upon what they
13 allege are coercion, acquisition, and restrictive contracts.

14 So let's move onto Document Number 998 which relates to
15 likeness rights. And I'm not sure if I fully appreciated what
16 it is that we're anticipating is going to come in. And I don't
17 know, Mr. -- actually, let me hear from the plaintiffs.

18 I mean, having seen this, and I know you haven't
19 responded, but your response to that? And who's going to be
20 arguing that?

21 (Court reporter clarification.)

22 THE COURT: Sorry. I was coughing. Can you say that
23 again?

24 MR. YOUNG: My name is Christopher Young.

25 THE COURT: Okay. Mr. Young, first of all, my first

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1 question is what evidence of likeness rights are you going to be
2 producing? Because we can potentially short-circuit this pretty
3 quickly.

4 MR. YOUNG: Yes. So there's a couple of episodes
5 involving likeness rights. The most prominent of which is --
6 involve -- involves Plaintiff Jon Fitch when he was retaliated
7 against and fired by Zuffa. When Plaintiff Fitch tried to
8 resist the imposition of a likeness identity rights clause in
9 the contract, Zuffa ended up firing Mr. Fitch, started
10 retaliating against members of his gym, AKA, and Mr. Fitch was
11 eventually reinstated once he decided to acquiesce and sign that
12 contract.

13 Now, this goes to several elements or several aspects
14 of plaintiffs' monopsony theory, mainly the contracts aspect and
15 the -- and the coercion aspect because there are elements of
16 Zuffa's exclusive contracts that do deal with identity, likeness
17 rights. And exercise of Zuffa's power over these fighters are
18 an element --

19 THE COURT: So, Mr. Young, one of the things I found in
20 my order was that as it related to the likeness rights, right,
21 they were -- and related to identity class, the reason I didn't
22 certify it, is these were very different types of rights and the
23 way that they operated was very different. And I just think
24 that it would be very confusing to include likeness rights
25 contracts in this case. I don't see how that wouldn't confuse

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1 the jury because they don't operate in the same way, right.
2 They don't have the same impact and there's no class. So why
3 would I allow that?

4 MR. YOUNG: So, Your Honor, I would say that, you know,
5 at core this case is really about fighter compensation and how
6 fighters get paid for their services. Now, one of the aspects
7 -- you know, for example, a layperson might understand a
8 professional athlete, not just the MMA, to be able to profit
9 from their success in professional sports is through likeness,
10 sponsorship --

11 THE COURT: But, Mr. Young, I want to be very clear. I
12 appreciate that, but we're at a class action. This is not,
13 right, single individuals. And one of the issues that I had
14 with the identity class is that these rights and how they were
15 compensated worked very differently for very different class
16 members. So you're going to try to use this one example as a
17 way to, sort of, argue that potentially it applies to the entire
18 class when I basically found the exact opposite as it relates to
19 likeness rights. So I'm not sure again why I would allow that
20 now.

21 MR. YOUNG: Well, Your Honor, I would not say that
22 that's just a single episode, but really the most prominent.
23 And what this really goes towards and kind of, like, the three
24 main aspects of what plaintiffs allege to be the scheme is the
25 coercion aspect because plaintiffs -- several of the plaintiffs

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1 -- in fact I think -- I believe almost all of them have had
2 episodes where they tried to capitalize on their notoriety
3 through their identity, whether it's obtaining sponsorships or
4 trying to get compensated for appearing in video games or
5 commercials, and were denied by Zuffa and retaliated against.

6 It's not just related to Plaintiff Fitch. And I would
7 point you, Your Honor, to defendant's --

8 THE COURT: But, Mr. Young, my concern isn't about them
9 not being able to receive compensation. So, in other words, if
10 they want to testify that they didn't have other means of being
11 able to get compensation, fine. But we're talking about
12 something different where you're saying Zuffa used these
13 likeness -- these likeness and identity, sort of, related
14 contracts as coercion. That's what I'm talking about, and that
15 seems to me to be inconsistent with my prior ruling.

16 So I'm not going to limit the fighters or anyone from
17 saying, "This was our main source of income. We didn't have
18 other sources of income. Zuffa was able to -- for example, they
19 received money from our likeness rights. We didn't." They can
20 say that, but it's different to then say, "Well, I didn't sign
21 this one contract, and as a result of this -- of me not signing
22 this likeness contract, that is consistent with the types of
23 retaliation that the Court has found can be argued to the jury
24 in the bout class." I just don't see how that's appropriate
25 here.

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1 MR. YOUNG: Let me -- let me try this one more time,
2 Your Honor, but I would argue that it really goes to how Zuffa
3 maintains exclusive control over the fighters. You know, this
4 case is -- I'm glad Your Honor recognized this case is
5 ultimately about compensation -- fighters cannot get
6 compensation elsewhere. Then, you know, they are even more
7 subject to the control of Zuffa. And, you know, as Your Honor
8 recognizes, one of the common ways is to -- is these -- you
9 know, capitalizing off of your notoriety, your identity.

10 And what compounds the issue further is that these
11 are -- that Zuffa -- there's evidence in this case that Zuffa
12 exercised its control over the fighters to retaliate and coerce
13 the fighters into further control, which is what -- exactly what
14 happened to Mr. Fitch. Mr. Fitch refused to sign his contract.
15 They retaliated not only against him and members of his gym.

16 Your Honor, I would also say that, you know -- I would
17 ask for an opportunity to fully brief this issue and, you know,
18 in the alternative I also think this might be more appropriate
19 to be dealt with in the context of trial to see what testimony
20 is actually going to be proffered at the time that it's given.
21 Because it is a little difficult to kind of speak of it in a
22 vacuum given that -- you know, besides, for example, Plaintiff
23 Fitch's testimony that we're going to be discussing which is
24 very prominent, there are other episodes that are described in
25 Zuffa's motion in limine. And, perhaps, the more appropriate

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1 course is to deal with them case by case as they come up in
2 trial.

3 THE COURT: Okay. Thank you, Mr. Young.

4 I'm not sure who is arguing this for defendant.

5 So, I mean, I think I asked the questions of Mr. Young
6 that I thought were appropriate. Is there anything else you
7 wanted to add to that, Mr. Yates?

8 MR. YATES: I don't think so, Your Honor. I mean, this
9 is -- this would be testimony about a class that was not
10 certified. I think it would be incredibly confusing for the
11 jury. There would be a substantial risk that instead of -- you
12 know, we believe that Dr. Singer is wrong and his math and his
13 regressions are completely flawed and inadmissible. We've made
14 that point. But on the identity class you get the risk of
15 juries -- you know, a jury seizing on -- and by the way, all the
16 identity evidence is from before 2010, I think. You know, you
17 get -- you get the risk of a jury seizing on that and disliking
18 Zuffa and awarding damages based upon that.

19 THE COURT: And you're not really disputing, I just
20 want to make clear, Mr. Yates, a fighter, for example, being
21 able to say, "We didn't get, for example, money from this
22 particular source." You're not talking about that. You're
23 talking about a legal dispute over likeness rights, correct?

24 MR. YATES: Yes, legal disputes over likeness rights.
25 If they want to say, "I think I should have gotten some more

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1 money for this," they can say that. I will say that it's, sort
2 of, one-off anecdotal evidence that is pretty unique to example
3 Mr. Fitch. I'm not sure it applies class wide. And so I've
4 got -- I just want to note that I've got real concerns about
5 that in a class action because Your Honor did not certify an
6 identity class. And so if we get into identity evidence, I'm
7 not sure that we can really talk about that in a class
8 proceeding because the class was not certified.

9 But thank you, Your Honor.

10 THE COURT: I appreciate that, Mr. Yates.

11 I am going to grant the motion as relates to the
12 likeness rights here. I do find that it would be confusing to
13 the jury. I didn't certify that class, and I don't find that
14 the disputes over these rights would be appropriate for
15 consideration by the jury. So that motion will be granted.

16 Now, we're going to Document Number 998, the same
17 document relates to the issue of Zuffa not sharing content with
18 competitors. Who's going to be arguing that for the plaintiffs?

19 MR. YOUNG: Christopher Young for the plaintiffs, Your
20 Honor, if you'll just give me a moment.

21 MR. CRAMER: Which one is 998, Your Honor?

22 THE COURT: This is the Motion in Limine Number 6 I
23 believe that relates to motion to exclude evidence or testimony
24 related to Zuffa that clients have shared UFC video content with
25 competitors. So that's Document 998, and it's their Motion in

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1 Limine Number 6.

2 Is that you still, Mr. Young?

3 MR. YOUNG: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. YOUNG: Unless you're sick and tired of me already,
6 Your Honor.

7 THE COURT: So, okay. So, Mr. Young, plaintiffs point
8 to the fact that, you know, companies are not required to
9 cooperate with their competitors. And that's true. So what
10 would this video be -- this particular practice be used for in
11 the context of the trial?

12 Now, I have certainly addressed in my order the issue
13 of, sort of, counter programming, right, but I'm not really sure
14 how this particular information would be used.

15 MR. YOUNG: So in the particular -- with this type of
16 evidence, how it would come up in trial is there would be
17 certain fighters who have left the UFC's employ, left Zuffa's
18 employ, to go fight for another promotion. And because the
19 rival promotion does not have access to the video library of
20 that fighter, they cannot use the fighter's prior fights in
21 order to promote their videos, which kind of leaves the fighter
22 and the rival promotion in a bit of a bind because they cannot
23 -- they cannot advertise this fighter who is destroying their
24 promotions, which fits into the theory because it elevates
25 Zuffa's market control vis-à-vis the fighters as well as the

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1 other promotions. It really goes towards the coercion aspect of
2 the scheme.

3 THE COURT: And so I'll go back and look at the
4 contract. This was a specific aspect of a contract or you're
5 arguing this was a practice that witnesses are going to be
6 testifying about? Because --

7 MR. YOUNG: This is a -- this is a practice. I believe
8 this will mainly come in the context of Mr. Kutor (phonetic), if
9 it comes up at all, but -- and I'm looking over at my colleagues
10 at the table to see if I've said anything incorrectly.

11 But I do believe that this is not related specifically
12 to the fighter contracts, but it is related to other aspects of
13 the contracts and Zuffa's business practices.

14 THE COURT: So what you're saying is what would happen
15 is that you would have fighters come in and say, "Even when we
16 left, we couldn't promote ourselves because we couldn't get
17 access to the video"?

18 MR. YOUNG: Yes.

19 THE COURT: And that this --

20 MR. YOUNG: Either us or the promotion that we are now
21 signing for, we can't -- we can't have access to our fight
22 history. We can't use that for commercials, for advertisements,
23 to -- you know, for example, to promote our next fight or
24 something.

25 THE COURT: Okay. I guess the concern that I have here

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1 which I think the defendants have is the suggestion that somehow
2 they're required to do that, which they're not, right. I mean,
3 it seems to me of the allegations of the scheme that may have
4 had the greatest impact on the alleged dominant market share of
5 Zuffa, this doesn't appear to be one that was actually pushed
6 really by the plaintiffs or there is a lot of evidence to
7 support this.

8 Now, there's certainly evidence to support this idea of
9 counter programming, which is different, right. I'm just not
10 sure about this idea that somehow this was an aspect of their
11 scheme. And in particular, Mr. Young, my concern is that a jury
12 would be confused into believing that they had to do this,
13 right. This is different than restrictive contracts or other
14 things, right.

15 And so how would we address that particular confusion
16 or prejudice to the defendants?

17 MR. YOUNG: So a couple of points, Your Honor. This
18 case isn't about an anticompetitive refusal to deal, which is
19 what the *Trinko* case talks about as cited in the briefs. So if
20 that's what we're discussing here, we would appreciate an
21 opportunity to fully brief the issues because we are sensitive
22 that they're not required to --

23 THE COURT: So how do we address that? Certainly
24 you're talking about this information wasn't available, but as
25 far as I know, it's not necessarily generally available anyway.

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1 Like, even if they weren't engaged in these alleged aspects of
2 this, quote/unquote, scheme, right, they would never be required
3 and I don't know a case that says that that would be a, sort of,
4 touchstone of sorts of anticompetitive behavior.

5 So why would we bring this up in a way that the jury
6 might think that they had to do it when they didn't have to do?

7 MR. YOUNG: So a couple of points in response to that,
8 Your Honor. The most -- the easiest way would probably be
9 through an instruction. There are form instructions that
10 describe it -- that asks the Court to instruct the jury about
11 the nature of the anticompetitive scheme.

12 You know, here, we're alleging a scheme that occurs and
13 has multiple prongs, you know, the acquisitions, the contracts,
14 and the coercion. And this really fits into the coercion part
15 of that kind of tripartite scheme just broadly.

16 THE COURT: Because I don't remember, Mr. Young,
17 extensive testimony about this from the fighters. I mean, there
18 are things that they talked about as coercion. I don't remember
19 this being actually a central pillar of the argument or the
20 experience of the fighters in this case.

21 So, again, I am concerned about the, sort of, prejudice
22 to the defendants outweighing any probative value of this
23 particular information.

24 MR. YOUNG: So, Your Honor, I will say that, you know,
25 this is -- this is something that is extracted from the fighters

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1 that this -- that Zuffa's control of the fighters' previous --
2 previous fights and the video. What I would say is that we are
3 sensitive to the prejudice that Your Honor has recognized, but
4 we'd like an opportunity to fully brief this given that this
5 wasn't really touched upon fully in discovery as it seems to be
6 hinted at here.

7 THE COURT: Well, here's what I will tell you. You
8 will have to convince me why I should allow it. I'm perfectly
9 fine with -- and I'll hear from the defendants, but I'm
10 perfectly fine with people saying we didn't have access to this
11 information so we couldn't promote ourselves, but -- I guess.
12 But, again, it seems that I -- it would be inappropriate and
13 prejudicial and misleading to somehow suggest that this was part
14 of a scheme or the scheme that's been alleged. I don't find
15 that to be a central aspect of the scheme. I don't find that to
16 be centrally what was discussed in terms of what was put before
17 me.

18 So I am going to grant the motion for now. But, look,
19 as with many of these motions, as the evidence evolves, I'm
20 always open to reconsidering them, but we'll move on from there.
21 Unless the defendants want to add anything?

22 No. Okay.

23 MR. YOUNG: Your Honor, would Your Honor be amenable to
24 briefing on this issue if we were to submit it?

25 THE COURT: No, I don't think we need any briefing on

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1 this. I mean, what will happen, I will tell you all this, we
2 are going to have, as you all know, another hearing on the 28th.
3 That's going to be a long, all-day affair where we just go
4 through and grind out all of this stuff. This is just to give
5 you some sense of these rulings on these motions so we can shape
6 that argument. Because that's going to be -- we're all going to
7 have to roll up our sleeves and just go through lists and maybe
8 that involves, sort of, depo excerpts, whatever we're going to
9 do. That's what we'll do it then. We'll have some expert
10 testimony, too.

11 So I don't need briefing on this. Again, I set this
12 hearing after hearing -- after the filing of the motions to
13 avoid exactly that, Mr. Young. We have enough briefing in this
14 case. So I appreciate that, but no. Thank you.

15 MR. YOUNG: Thank you, Your Honor.

16 THE COURT: Uh-huh.

17 So let's see. Another aspect of this same motion,
18 which is I think Number 7, is the argument about precluding the
19 evidence about monopoly power.

20 MR. CRAMER: Your Honor, this is another effort by
21 Zuffa to make the same argument they've lost before. We are
22 not -- we are not going to put in evidence of monopoly power to
23 prove a monopoly claim. We have a monopsony claim. But as Your
24 Honor recognized in the summary judgment opinion, evidence of
25 monopoly power in this industry can bolster and support evidence

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1 of monopsony power.

2 THE COURT: So I guess this comes down to a very basic
3 question, Mr. Cramer. Are you going to use the word "monopoly"?
4 Because I actually think there's a difference between saying
5 Zuffa dominated the output market, that they had a certain
6 control over that. The term "monopoly" has very particular
7 meanings to people, even I think lay people.

8 Is it your intention to use that term? Because I would
9 be a little more concerned about the use of the term than about
10 the description of what it represents.

11 MR. CRAMER: Well, Dr. Singer in his report uses
12 monopoly power, not necessarily monopoly, monopoly power or
13 market power in the output market. He defines an output market.
14 He shows Zuffa has over 90 percent of the output market.

15 THE COURT: Okay. But, Mr. Cramer, I guess I'll go
16 back to my question.

17 MR. CRAMER: Yes.

18 THE COURT: Is the presentation of evidence depending
19 upon use of that particular term?

20 MR. CRAMER: Does it depend on that? No, he can use
21 market power instead of monopoly power, but the concept is
22 important because, as Dr. Topel admitted, in this industry if
23 you have a monopoly on the output market, the market for putting
24 on an MMA events, then you have a monopsony in the input market.
25 They're related.

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1 THE COURT: I'm concerned about the confusion -- look,
2 this is a complicated case as it is, right, between the experts
3 who don't agree upon a lot of things. I'm concerned about the
4 use of the term as relates to monopoly power. I agree that
5 this -- that's not the argument you're putting forth. And
6 certainly I had put it in my own order that the monopoly power
7 that was exercised allegedly by defendants in the output market
8 be enforced, right, and augmented its monopsony power allegedly,
9 right, and that's fine.

10 I'm just trying to figure out, sort of, how it would be
11 presented. Let me hear from the defendants, then I might bring
12 you back up.

13 THE COURT: Let's see. Is it Ms. Phillips?

14 MS. PHILLIPS: Phillips. Yep. Good afternoon, Your
15 Honor.

16 THE COURT: So, Ms. Phillips, in my order I talk about
17 there's been sufficient evidence of Zuffa's alleged dominance in
18 the output market reinforcing its monopsony power. If we do
19 away with the use of the term, how is that not consistent with
20 what I've already written about?

21 MS. PHILLIPS: Sure. I think -- I mean, the standard
22 is different, right. You were talking about summary judgment.
23 Here, we are talking about what can come into evidence. So
24 we're talking about relevance for 402. We're talking about
25 prejudice for 403, right. Completely different standard from

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1 what you already considered.

2 So I agree with you. You started off I think at the
3 403 place, which is that the jury, which is not going to receive
4 any jury instructions whatsoever on a monopoly, they're not
5 going to hear, right, any evidence from fact witnesses about a
6 monopoly. That's going to be incredibly confusing to them to
7 all of a sudden hear some references to monopoly power.

8 THE COURT: So what if we just get rid of the term? I
9 mean, I do think there's been sufficient evidence, relevant
10 evidence, of how the alleged dominant market share of Zuffa in
11 the output market augmented its monopsony power. So if I simply
12 direct the plaintiffs and experts not to talk about or use the
13 term, I should say, not to use the term "monopoly" in the
14 context of talking about dominant market position and the output
15 market, how does that not address the issue?

16 MS. PHILLIPS: Sure. I mean, I think at the end of the
17 day I don't know of any Section II case that says where a
18 monopoly plaintiff was allowed to put forth evidence of monopoly
19 power for the sole purpose of proving monopsony power.

20 THE COURT: Right, but I've already found that. So
21 I've already made the determination that they've presented
22 evidence that their experts talked about how that helps to
23 augment their monopsony power. So I've ruled on that part of
24 it. But I also understand the concern about the confusion about
25 the type of claim they're presenting.

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1 So I go back to why wouldn't this be addressed by
2 simply eliminating the term. Because it sounds like you're
3 asking me to exclude evidence that essentially I actually used
4 in my own summary judgment -- I'm sorry -- my certification
5 order and also incorporated in my summary judgment order. Why
6 would I change that now?

7 MS. PHILLIPS: Well, because, again, I still think at
8 the end of the day they originally brought a monopoly power
9 argument, right, or a monopoly argument. That has since been
10 abandoned. We're talking about monopsony. That is the
11 evidence. Monopsony power is what is relevant here. And that's
12 what we should focus on.

13 Otherwise, we're going to get into -- right, if they're
14 talking about monopoly power, they're talking about venues and
15 sponsorships. They're talking about all of these things that
16 we're going to have to get into at trial, and the jury's going
17 to be incredibly confused. Why are we talking about those
18 things when the argument is the fight for fighter services,
19 right?

20 So I think at the end of the day it's an incredibly --
21 we still believe it's irrelevant, and it will also be incredibly
22 confusing to the jury to hear evidence of this.

23 THE COURT: So why wouldn't we then just limit the
24 extent of how they talk about this monopoly power? Because in
25 my ruling as it relates to the certification, I was specifically

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1 focussed on the expert testimony that opined that that market
2 power augmented the monopsony power. And I found that to be
3 sufficiently presented that would be -- that can go -- the case
4 can go forward and that the case -- that can go to the jury.

5 So if your concern is about, sort of, a mini trial as
6 it relates to establishing that, we can deal with that in terms
7 of limitation of the evidence that comes in. So I'm going to
8 allow some portion of that because I found that in my
9 certification order. If you want to present, and maybe we do
10 this on the 28th, some further argument about what should be the
11 extent of that, I'm happy to consider that because I don't want
12 us to get into a claim about them establishing a monopoly power
13 because I would agree with you that would be confusing and
14 irrelevant. And I am happy to limit that to the area that I
15 found that they had presented, which is Dr. Singer's argument
16 about that power augmenting the monopsony power.

17 So we can have a further discuss about that --

18 MS. PHILLIPS: Okay.

19 THE COURT: -- but I agree with you that I don't think
20 that we need to have a full mini trial, and we shouldn't, about
21 whether or not Zuffa technically, quote/unquote, had a monopoly,
22 one, because that claim has been abandoned, but also it would be
23 very confusing to the jury.

24 So I'll hear from the plaintiffs, but I think we need
25 to come back and sort of clarify this at our March 28th hearing.

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1 And I would ask you, Ms. Phillips, to think about what you --
2 where do you think the line should be.

3 MS. PHILLIPS: Okay. Appreciate it. Thank you, Your
4 Honor.

5 MR. CRAMER: Your Honor, briefly. We do not intend to
6 talk about the monopoly over venues and sponsors. As Your Honor
7 knows, Dr. Singer focussed on Zuffa's dominance monopoly power
8 in the market for live MMA events. And we showed --

9 THE COURT: So how would he talk -- I mean, I've read
10 the -- how is he going to talk about it? I mean, it's one thing
11 for you to say that to me, but when he gets on the stand, he's
12 going to say a little bit more than that.

13 MR. CRAMER: Yeah.

14 THE COURT: And he'll have to, Mr. Cramer --

15 MR. CRAMER: Right. So --

16 THE COURT: -- in order to explain that to the jury.

17 MR. CRAMER: Right. So he'll talk about the share that
18 they had, and that that share -- when you have a dominant share
19 of the output market, that bolsters and supplements your power
20 in the input market. It bolsters your monopsony power. Because
21 if you're putting on most of the shows with all of the highly
22 ranked fighters, that's where all of the fighters want to go.
23 And that's what Dr. Topel admitted. Their expert admitted that
24 this is an industry where if you have monopoly power, you also
25 have monopsony power.

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1 And that's what we're going to talk about, the
2 relationship between the two. We do not intend to put on a
3 monopoly case. We tend to put on a monopsony case, but as Your
4 Honor recognized, monopoly power is relevant to the monopsony
5 case.

6 THE COURT: Okay. Thank you.

7 Ms. Phillips, I will say this to you because I -- what
8 I actually anticipate is you may actually want to put on more
9 about monopoly power than plaintiffs do, in part, to dispute
10 what they're saying. So when we come back on the 28th, I want
11 you to also think about that. Because I would anticipate what
12 you may want to come in and say is we actually didn't have
13 monopoly power, and you have to -- you have to be able to prove
14 that.

15 MS. PHILLIPS: That's why they abandoned the claim
16 because they didn't develop any evidence of the monopoly power.

17 THE COURT: Right.

18 Mr. Cramer, you don't need to respond to that. We're
19 not in trial yet.

20 But I'm saying that to you, Ms. Phillips, because I
21 actually think the party that's going to be presenting more on
22 monopoly power indirectly most likely would be Zuffa
23 specifically to contest the argument. And so I'm saying that to
24 you because what I don't want to have happen is they are
25 limited, and then you come in and then you present all of this

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1 evidence which they didn't know you were going to present. And
2 then we have to bring Dr. Singer back.

3 And so what I want you to think about is how you want
4 to be able to argue that. I'm going to allow the plaintiffs to
5 talk about dominant market share without using the term
6 "monopoly" in terms of its impact on monopsony power.

7 And so I would anticipate that Zuffa's going to want to
8 argue, one, that that's not true even if there is such dominant
9 market share, but we also didn't have it and here's our evidence
10 that we didn't have it. And I want you to be able to come back
11 and tell me about that because that to me is where there may be
12 a little bit more back and forth. Okay?

13 MS. PHILLIPS: Thank you, Your Honor.

14 THE COURT: All right.

15 Let's move on. So basically I'm, sort of, denying that
16 motion in part and granting it in part for the reasons I've
17 stated.

18 Let's talk about Zuffa's other portion, this is the
19 next portion of that same document, which is the motion
20 regarding Zuffa's prior litigation and related legal, sort of,
21 conduct. Excuse me.

22 And I first want to -- yes, Mr. Cramer? Are you going
23 to be arguing this?

24 MR. CRAMER: I would just ask, given that there's some
25 First Amendment issues in there, that we be able to brief this

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1 issue.

2 THE COURT: Well, what would be helpful for me,
3 Mr. Cramer, the reason why I also am doing this now is to get a
4 sense of what is it that you're going to be presenting because
5 it also helps me to prepare. What would you anticipate, right,
6 that you would present in terms of prior litigation?

7 Because, first, I could see the door being opened by a
8 host of different witnesses potentially by Zuffa just in terms
9 of the history of the organization. But that still would
10 present an issue of what is it you are trying to bring up.

11 (Plaintiffs' counsel conferring.)

12 MR. CRAMER: I'm going to let Mr. Madden answer this
13 question.

14 THE COURT: Oh, there you go.

15 So, Mr. Madden, what is it you would want to bring up
16 exactly so that helps me to figure this out.

17 MR. MADDEN: Sure. So some of the testimony in the
18 case concerns litigation that Zuffa brought against competitors.
19 I know that they sued the International Fight League, the IFL.
20 There was testimony from the IFL's -- I believe his title was
21 president, Kurt Otto, about how that litigation impaired his
22 promotion and ultimately --

23 THE COURT: So, Mr. Madden, my concern about litigation
24 like this is there are a whole host of reasons that parties may
25 engage in litigation, and they're entitled to do it. It's no

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1 different than my concerns about the issue about the likeness
2 rights.

3 A contract dispute or a dispute about potentially
4 infringing upon whatever rights that Zuffa may have had with a
5 particular athlete or with a particular partner can be construed
6 as part of a scheme, right, and anticompetitive.

7 This, again, is not an aspect of the plaintiffs' case
8 that I saw that there was major support for in terms of the
9 certification or the arguments present related to the scheme.
10 So I'm not sure how there isn't going to be the same issue as it
11 relates to, sort of, prejudice and confusion to the jury, in
12 part, because then we have to get into whether or not the
13 litigation was actually about the alleged scheme.

14 They're going to argue, whether or not I agree with
15 them or not, "Each time we had an independent legal basis to
16 bring litigation." Then what do we do? We're in a situation
17 where now you're arguing to this the jury, "In fact, no, this is
18 part of the scheme," and now we have to get into the particular
19 litigation. And that's completely, to me, confusing to the
20 jury. And I don't find it to be at that point particularly
21 relevant to the alleged scheme.

22 So why would I let this in?

23 MR. MADDEN: So the scheme's purpose is to impair
24 rivals and ultimately corner the market, right. And so what we
25 would introduce it for is as further evidence of the willful

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1 acquisition and maintenance of the monopoly or, excuse me,
2 monopsony, recognizing the problems that we just had.

3 And while I recognize that there are a lot of technical
4 issues, First Amendment issues, that's why we're asking to brief
5 this particular --

6 THE COURT: Yes, but what I'm -- from my standpoint,
7 Mr. Madden, it would be different if, for example, Zuffa had a
8 standard complaint it filed every single time. And you were
9 going to argue to the jury, "Every time a competitor went into a
10 the market they filed this exact case." That's actually not
11 what you're arguing here. You have different cases that have
12 different issues.

13 How is that part of a pattern, right, that can easily
14 be discerned by the jury that wouldn't be confusing to them?
15 Right, because they're entitled to do that. How is the jury
16 supposed to figure out this is part of a pattern or practice
17 versus a scheme when in fact, I mean, most of us couldn't figure
18 it out and it's not as clear, for example, as the, sort of,
19 alleged argument that we would match people with certain types
20 of fighters as a way to coerce contracts? That's a fairly
21 straightforward argument. You know, whether it's true or not,
22 that's a fairly straightforward argument.

23 This seems to me to be incredibly confusing. I'm not
24 sure how you would get out of that. How do you get out of that?

25 MR. MADDEN: Yeah. Our claim is that Zuffa went to

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1 starve its rivals of things that they needed, and one of those
2 things that they needed was capital. And in this particular
3 situation with the IFL, their lawsuits starved them of capital.
4 And that along with the other aspects of the scheme ultimately
5 put the IFL under. And so our position would be that we should
6 be permitted to introduce evidence of the ways that Zuffa
7 starved its rivals of the things that they needed to compete
8 with Zuffa.

9 THE COURT: Okay. Thank you, Mr. Madden.

10 MR. MADDEN: Thank you.

11 THE COURT: I'm not sure who's going to argue this
12 for --

13 MR. JOHNSON: I will, Your Honor.

14 THE COURT: Okay. Mr., who is that, Johnson?

15 MR. JOHNSON: Yes, David Johnson for Zuffa.

16 THE COURT: Uh-huh.

17 MR. JOHNSON: Good afternoon, Your Honor.

18 THE COURT: Good afternoon.

19 MR. JOHNSON: Your Honor, I think as you have
20 identified, this is a clear-cut motion for defendants here.
21 It's the *Noerr-Pennington* doctrine. It directly prohibits them
22 from using this evidence for the exact theory of relevance that
23 Mr. Madden just articulated. As Your Honor noted, we are
24 entitled to bring these lawsuits. Thus, we cannot have an
25 adverse inference drawn against us for having brought them. And

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1 that's the end of it under 401.

2 Your Honor already identified the incredible unfair
3 prejudice that would also result. It would be confusing to the
4 jury, misleading. It would result in a complete waste of time
5 to have a trial within a trial about prior trials that happened
6 in or trial lawsuits that were brought in 2006, 2008. That's
7 mostly what they're talking about with this International Fight
8 League dispute that Mr. Madden mentioned.

9 So it shouldn't come in. It cannot come in under
10 *Noerr-Pennington*, and 403 says that it shouldn't as well.

11 THE COURT: Thank you.

12 MR. JOHNSON: Thanks, Your Honor.

13 THE COURT: I agree with that. I am going to grant
14 this motion. I think that in this case it will be confusing to
15 the jury and I think it would be prejudicial unfairly to the
16 defendants. And I think on those bases alone this type of
17 evidence should be precluded.

18 Now, we move onto a new document, Document Number 992.

19 There are a couple of issues here, and I will tell you
20 I am inclined to leave these until the 28th. Partly, these are
21 very specific issues as it relates to references to aspects of
22 Dr. Singer's report. But I did have a couple of questions.

23 Who's going to be arguing this for Zuffa?

24 MR. CHIU: I will be, Your Honor.

25 THE COURT: Okay.

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1 Mr. Chiu, I just want to make sure -- and I'm pulling
2 up the document again.

3 MR. CHIU: And this is the Motion in Limine Number 9?

4 THE COURT: Yes.

5 Well, there's -- well, there's some related issues.

6 MR. CHIU: Yeah.

7 THE COURT: So there's 9, 10, and 11. But I want to
8 focus mostly on 9 and 10 for now.

9 MR. CHIU: Okay.

10 THE COURT: Because these seem to be arguments about,
11 sort of, what terms can be used --

12 MR. CHIU: Right, I think --

13 THE COURT: -- or you're talking about arguments?

14 Because the one seems to be just like the term foreclosure
15 share. Maybe I'm missing something.

16 MR. CHIU: Correct. So Motion in Limine Number 9 is
17 really about precluding Dr. Singer from using the term
18 "foreclosure share." Obviously we had a fight about the
19 admissibility of his analysis. We lost that, and we're not
20 disputing that. But really this is about the use of the term
21 "foreclosure share" because that's actually a legal element of
22 the claim, with respect to the exclusive contracts, whether
23 they -- the exclusivity of the multi-bout contracts amounted to
24 an anticompetitive -- you know, caused harm to competition and
25 was an antitrust violation. The jury instruction on exclusive

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1 dealing has the legal term "foreclosure." That is something the
2 jury has to find so --

3 THE COURT: So, Mr. Chiu, I guess what I would say to
4 you, which is what I said earlier, which is I anticipate
5 particularly coming back on the 28th having a conversation with
6 you all about the jury instruction to the jury about expert
7 opinion versus what are the legal requirements of the claim.
8 Because this is going -- this particular argument is going to
9 come up all the time, right, because the experts are going to
10 essentially, as they're allowed to, opine on certain aspects of
11 the elements of the claim. And so we're going to have to figure
12 a way that we explain to the jury however they explain that or
13 whatever their opinion is, whatever terms they use, ultimately
14 it's the province of the jury to determine whether or not
15 there's been evidence presented one way or another to the
16 appropriate standard of the particular element of the claim.

17 Why wouldn't that address this type of an issue for
18 Dr. Singer's report?

19 MR. CHIU: I think the fact of having plaintiffs'
20 expert say over and over again the term "foreclosure share" in
21 presenting his opinion is essentially opining on the legal
22 conclusion, right, because that's what the jury has to find. He
23 can present his model and his evidence and say, "Look, what is
24 foreclosure share, is a formula." He calculated foreclosure
25 share by looking at, you know, the number of Zuffa athletes

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1 by -- you know, weighted by --

2 THE COURT: So what term should he use, Mr. Chiu? I
3 mean, if he doesn't use that term --

4 MR. CHIU: He can say percentages. He can say, "Look,
5 by virtue" --

6 THE COURT: But it's not a percentage. That's the
7 thing. It's --

8 MR. CHIU: The foreclosure share is a percentage. He
9 says it's 90 percent.

10 THE COURT: Okay, but it's not simply percentage. It
11 is a -- it is a part of his regression analysis. So it's
12 related to a percentage in terms of what percentage of the
13 market is foreclosed, but it allegedly captures more than that.
14 I'm just trying to think of how he would describe it because I
15 don't think percentage actually is accurate and I think it may
16 be confusing. So I'm just trying to think of another way that
17 you would propose --

18 MR. CHIU: Yeah, I mean, I think this is very similar
19 to kind of another issue we were discussing earlier which is the
20 issue of durable monopsony power, for example.

21 THE COURT: Right.

22 MR. CHIU: That's a situation where, you know, it would
23 be a similar situation if we had an expert actually saying to
24 the jury over and over again, you know, X party had durable
25 monopsony power. Actually what goes under that actual economic

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1 evidence looking at market shares, looking at elements of
2 conduct.

3 THE COURT: So here's what I think we're going to do
4 because this has brought up something that I think we need to
5 work out, and we're going to come back on the 28th, as you know.
6 I want you all to first meet and confer about this. I want you
7 to come up with, one, for that particular hearing, right, terms
8 or phrases that you think might be used that you think are too
9 close to a jury instruction where we need to have some way of
10 addressing that.

11 I don't want to do -- I mean, we're going to have to do
12 this individually, but I don't want to do this with just this
13 one back and forth.

14 MR. CHIU: Fair enough.

15 THE COURT: This is going to come up all of the time
16 because these experts are saying things that are both stated in
17 terms of aspects of the jury instruction, and we need to figure
18 a way to do this. And so what I'm going to ask you all to do is
19 by that date -- and we'll have to do it before that date.

20 Let's see. Get it to me by the 22nd of March. This is
21 just for the experts, aspects of the reports where -- again,
22 terms. I don't want you to go through -- I don't want this to
23 be a whole discussion about the legitimacy of the theories.
24 We've already been down that road.

25 MR. CHIU: No, that's not what this is going to be.

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1 THE COURT: Right. Monopoly, right, foreclosure.
2 Like, there are going to be terms that they use in their reports
3 that may be objectionable to either side as potentially
4 eclipsing the, sort of, province of the jury.

5 MR. CHIU: Correct.

6 THE COURT: And so I want you all to help me figure out
7 where that is going to come up before we get into it where we're
8 not having to do that at the trial.

9 MR. CHIU: So, Your Honor, just one point on that. I
10 don't have the precise schedule in front of me. Would it
11 benefit the Court for us to have submitted proposed jury
12 instructions? Because a lot of this I think dovetails with
13 that, which is --

14 THE COURT: Yes, I think that's right. I'm going to
15 look at that. I was about to pull that up. So thank you,
16 Mr. Chiu, because it would be great to work out the jury
17 instructions, actually, on the 28th because I think in this case
18 the jury instructions will obviously be significant, as they are
19 in every case, but particularly in this case as relates to
20 understanding the experts' testimony.

21 MR. CHIU: Just so we're not briefing this in a vacuum
22 because this dovetails with that.

23 THE COURT: I have to pull this up, our schedule,
24 again.

25 And if anyone knows the date, you can just yell it out

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1 because I'm trying to look for the ... jury instruction
2 deadlines.

3 We have that order. Where is the order?

4 MR. YATES: Your Honor?

5 THE COURT: Yes.

6 MR. YATES: You said yell out, so I'll yell out.

7 THE COURT: Yes.

8 MR. YATES: And I -- I got this from Ms. Phillips, so I
9 should probably let her yell out. But we're supposed to
10 exchange with the plaintiffs, I believe, by March 12th and then
11 submit to the Court on April 1st.

12 THE COURT: Oh, so we need to -- I think we should
13 probably step that up. Because I think, honestly, this is going
14 to be something where you all are going to want to have a lot of
15 time back and forth.

16 And so you all are going to exchange on March 12th.
17 Then on April 1st you are going to submit something to me. And
18 I know you all have a lot of work to do, but you're going to
19 have to do that before the hearing. So I'm going to move that
20 date from -- up a week from the 1st to March 25th.

21 MR. SAVERI: I'm sorry. March 25, Your Honor?

22 THE COURT: Yes. Two-five, 25th.

23 MR. YOUNG: Monday.

24 THE COURT: Okay. Because I agree with you, Mr. Chiu,
25 there are going to be a whole group of terms or things we're

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1 going to have a discussion about, and I want to work that out.

2 And we can talk about it then.

3 MR. CHIU: Okay.

4 THE COURT: Mr. Cramer, are you going to add something?

5 MR. CRAMER: I did just want to comment on this
6 project, if I may.

7 THE COURT: Yes.

8 MR. CRAMER: So, as Your Honor knows, in antitrust and
9 antitrust economics there's a lot of overlap, right. So the
10 jury instructions are going to have relevant market. The
11 experts are going to talk about relevant market. It's going to
12 be monopsony power. The experts are going to talk about
13 monopsony power. Dr. Topel is going to talk about
14 procompetitive justifications. We're going to be talking about
15 anticompetitive effects.

16 I do think it would be quite confusing to the jury if
17 we're making up terms that our economists are going to use,
18 economic terms, that are different from the economic terms in
19 the jury instructions. I think that's going to lead to a lot of
20 confusion.

21 In my experience in antitrust cases, foreclosure share
22 is an economic term. They're going to cross-examine on
23 foreclosure share --

24 THE COURT: No, I think, Mr. Cramer, my concern is if
25 the expert's using the term differently. We have to be very

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1 careful that what the experts don't do is redefine aspects of
2 the instructions, right.

3 And so I agree monopsony power is going to be used, but
4 ultimately I'm the one who tells them what that means. And we
5 have to be mindful of the fact that if an expert starts to veer
6 into an area where it sounds like they're saying you can't have
7 monopsony power -- this is one of the things that, for example,
8 in terms of durable, sort of, market power that I would get
9 concerned about from both sides.

10 Zuffa wants to be able to say, "Look, we increased the
11 absolute value -- absolute number of events." There's no
12 dispute about that. And you can't show monopsony power, right,
13 or durable power in the market, right, as it relates to certain
14 aspects unless you're showing the restriction of certain aspects
15 of output, including events and the number of fighters and what
16 they could fight in. There are absolute increases to that.

17 Well, right, Dr. Singer is going to argue, "Well, yes,
18 but the level of the increases is not what it should have been
19 based upon what would be a competitive market." We have to come
20 up with a way that we give the juries either instructions or
21 help them understand that when the experts use a term, right,
22 that that is not defining what the legal -- well, the factual
23 determination by the jury using the Court's definition.

24 MR. CRAMER: So I think that is a good idea if we come
25 up with an instruction that advises the jury that every -- that

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1 an economist might use a term differently than the jury
2 instructions or the law requires. I just think it would be very
3 difficult and confusing if the economists can't talk about the
4 things that they normally talk about --

5 THE COURT: No, I'm not saying that, Mr. Cramer. What
6 I am saying is that there may be -- I didn't want to go through
7 each of their reports and have each of you come in here, right,
8 a week before trial and say, "We have 20 different ways they
9 talk about this that we disagree with." What we're going to do
10 is we're going to look through the instruction, we're going to
11 talk about the reports on the 28th, and go through that.

12 But if there are particular phrasings of things,
13 right -- so in this case defendants object to this term
14 "foreclosure share" because they think that it may improperly or
15 inappropriately to -- inappropriately discuss a particular
16 aspect of what the jury has to determine. I want to know about
17 that, Mr. Cramer, ahead of time. I don't want to be hit with
18 all of these things when we're in trial. We have time to be
19 able to work through these issues.

20 So it 's not that I wouldn't anticipate that there's
21 going to be some overlap; it's that I don't want to take a half
22 a day in the middle of the trial to work through this when we
23 could have worked through it previously.

24 MR. CRAMER: Fair enough.

25 THE COURT: And so I'm not going to say their experts

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1 have to go back and do a word replace for all of the terms that
2 are going to be in the jury instructions.

3 MR. CRAMER: Right. Okay.

4 THE COURT: That would be absurd. It wouldn't work.
5 I'm not suggesting that. But there may be ways, Mr. Cramer,
6 that the experts describe things in a very different way, right,
7 than the jury instructions are going to describe them, and they
8 need to know how to resolve that conflict when it occurs at the
9 trial. And that's what I want to work out, how we're going to
10 go about doing that. Because you're absolutely right. It's
11 going to be -- there are going to be a lot of terms, and there's
12 going to be a lot of overlap. But the jury needs to understand
13 that ultimately they have to follow the Court's instructions and
14 they have to know how to resolve that when it occurs.

15 And there may be instructions that I give to each of
16 you as relates to your experts to say, "You can opine about
17 this, but we want to be very careful about how we describe
18 things," right. You know, for example, one of the things I get
19 worried about from either side an expert saying, "Well,
20 economics simply doesn't recognize this as a monopsony." And I
21 am going to say, "That's not really what we're here, right, to
22 decide. You follow the instructions of the Court as it relates
23 to how that term is defined," right.

24 Not to say that that's not evidence that can be used as
25 it relates to the definition, but the definition of monopsony

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1 will be the definition of monopsony that the Court gives them
2 instructions on. But that's, for example, something we have to
3 describe.

4 The experts may come in and say, "You have to have this
5 percent for there to be an monopsony, this percentage of
6 control." We have to figure a way to work through that, right.
7 And I think that's what we need to do on the 28th. So I'm just
8 putting you all on notice of that particular issue because I
9 fully anticipate you all are going to in trial jump up and say,
10 "Your Honor, he's invading the province of the jury because he's
11 saying or the Court because he's describing what is required
12 legally for a monopsony, and that's not true." So that's what I
13 want this to be about, Mr. Cramer.

14 MR. CRAMER: Thank you, Your Honor.

15 THE COURT: Okay.

16 Any questions about that from the defense? I know,
17 Mr. Chiu, you were up here, but any questions about that?
18 Because I think that's going to be a real sticky issue that we
19 need to work out ahead of time. And, again, we'll have the jury
20 instructions on the 25th, but we've been going at this for a
21 minute. You know, I want to give people a break because we
22 still have a little bit of work to do, which is why we're all
23 here. So why don't we take a five or 10-minute recess.

24 The other thing I wanted you all to do is, if you don't
25 have a copy, your jury questionnaires. I have a copy of the

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1 jury questionnaire. I may have a few questions about that. We
2 intend to send the jury questionnaires out at the end of this
3 week. And so I may have some questions about some of the
4 questions that are in that questionnaire. So we're going to
5 look at that today, too. So I'd ask you to print that out and
6 just have a copy of it, whoever is responsible for that, because
7 I may ask you some questions about that, not a lot. But I just
8 want to give you all a little bit of a heads-up about that.
9 Okay?

10 All right. Any other questions before we take our
11 break? So we'll say we'll give it about 15 minutes. We'll come
12 about 3:10.

13 MR. CRAMER: Your Honor?

14 THE COURT: Yes.

15 MR. CRAMER: I hesitate to ask, but do you have an
16 outline of the next things you want to cover so we can --

17 THE COURT: I'm taking these motions in limine in -- I
18 tried to take them, although the document numbers aren't exact,
19 in the number. So we're going to go through all of Zuffa's
20 motions, and then I'm going to turn to plaintiffs' motions. So
21 I will just tell you now, if you want to know the numbers, I'll
22 give them to you, if that helps.

23 MR. CRAMER: Okay.

24 THE COURT: We just did 992. So then we'll do 994. We
25 already did the witness -- so that I think would be the end. Is

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1 that going to be the end? I think that's the end of Zuffa's
2 motions in limine. Then for the plaintiffs we did 993 already,
3 and we'll do 995. I think we've discussed 996, but we may
4 review that. And we'll do 997, 999, and 1000, 1001, 1002, 1003,
5 in that order.

6 Okay? All right. We will be adjourned. Thank you.

7 (Recess taken at 2:58 p.m.)

8 (Resumed at 3:19 p.m.)

9 THE COURT: Okay. We're back on the record here.

10 Let me say this first. I'm going to grant the
11 plaintiffs' motion to exclude the witnesses who are not
12 disclosed prior, the 13 witnesses who are on the list. I find
13 in this case that there is not a sufficient basis for why they
14 weren't properly disclosed pursuant to Rule 26, that it would be
15 prejudicial at this point in time to do so, that not having
16 identified them and the information by which they were
17 testifying puts the plaintiffs at a substantial advantage [sic]
18 if they were permitted to testify. So they will be excluded
19 from this trial.

20 All right. Let's move onto the next number.

21 So we hadn't actually addressed Motion in Limine Number
22 11 which related to Professor Singer testifying about promotion
23 capabilities, but that is again something we're going to address
24 at the March 28th hearing so I will leave that for then.

25 And then there's Document 994. There's Motions 12 and

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1 13. Who's going to be arguing those for the plaintiffs?

2 MR. SAVERI: Good afternoon, Your Honor. Joseph
3 Saveri. I'm handling 994.

4 THE COURT: So I guess my question -- I'm sorry. Is it
5 Saveri?

6 MR. SAVERI: It's Saveri.

7 THE COURT: Saveri. Mr. Saveri, there's a difference
8 between these witnesses testifying to what they understood
9 versus what they heard and what was commonly believed. And so,
10 I mean, it's I think a significant difference. I think
11 certainly witnesses could say, "My understanding of the
12 situation was that these negotiations occurred in a particular
13 way and that's how that happened."

14 And so what would you be seeking to have these
15 witnesses testify beyond that?

16 MR. SAVERI: Well, Your Honor, there are -- within the
17 scope of the motion there -- it's generally a hearsay -- a
18 series of hearsay objections. And so generally I think there
19 are a number of statements that our witnesses, our fighters, who
20 are going to be here in trial are going to testify to on the
21 stand based on their personal knowledge. To the extent they
22 heard something that was told to them by someone at the UFC,
23 those are going to be subject to hearsay exceptions.

24 And so I guess we would generally propose on things
25 like that that we'd deal with those with the witness on the

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1 stand because we -- we're going to be able to establish the
2 foundation or the exceptions to the hearsay rule. And rather
3 than deal with that now, we think it makes more sense to deal
4 with it in real time on the stand.

5 So there are probably a host of things that relate to
6 our case that our witnesses heard or were told by UFC. I'd note
7 that a lot of the questions that the defendants objected to
8 were, in fact, questions that they asked our witnesses at the
9 depositions. The fact that they asked objectionable --
10 objectionable questions at the deposition doesn't mean that when
11 we have our witnesses here we're not going to be able to elicit
12 admissible testimony. So that's what I would say on those, Your
13 Honor.

14 THE COURT: Well, okay. I tend to agree, but, again, I
15 guess the concern is here, and I'll hear from defendants, are
16 you going to consistently ask certain fighters the same type of
17 question about what was -- what they heard? I mean, they can
18 talk about their understanding from their own individual
19 perspective.

20 MR. SAVERI: Absolutely, Your Honor.

21 THE COURT: Right. But they can't opine about what
22 other fighters knew or commonly knew. I think that's a fair
23 point for them to raise. And it can be a very slippery slope
24 because someone can easily slide into saying that, "Oh, we all
25 knew," and they can't say things like that.

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1 MR. SAVERI: And, Your Honor, we don't -- we
2 wouldn't -- we are not going to elicit that kind of general
3 testimony. We're going to follow the rules of evidence. We're
4 going to ask our witnesses what they knew, what they heard, what
5 they had personal knowledge of. We're not going to ask them
6 general questions about rumors or things that were going around
7 the -- you know, the fighter community.

8 I mean, but, look, if they were somewhere, they were at
9 an event and someone who worked for UFC, one of the defendants
10 in the case, told them and there might be -- we're going to have
11 multiple level of hearsay problems, but we're just going to have
12 to sort through when the witnesses are on the stand.

13 THE COURT: Well, let me hear from the defendants.
14 Thank you, Mr. -- again, I want to say it --

15 MR. SAVERI: Saveri.

16 THE COURT: What's that?

17 MR. SAVERI: Saveri.

18 THE COURT: Saveri. I'll get it before the trial's
19 over.

20 MS. PHILLIPS: Hi.

21 THE COURT: All right, Ms. Phillips. So I do tend to
22 think that these are more, sort of, game-time-type decisions. I
23 would be concerned, as I said to Mr. Saveri, if there was going
24 to be a question that was asked to all of them, "What did you
25 understand about how this was done commonly?" I think they can

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1 talk about their own understanding based upon their
2 experience --

3 MS. PHILLIPS: And we agree with that, certainly.

4 THE COURT: -- but I think what you were worried about,
5 which I would agree with, is them being asked to opine about
6 what everyone understood or what everyone knew. Is that
7 correct?

8 MS. PHILLIPS: I completely agree with that, and that
9 has to do with how they frame their questions on direct. But,
10 also, even if you properly frame a question on direct, right, an
11 answer can come back, "Well, everybody knew this" or "Everybody
12 did this" or "I heard that through whatever."

13 THE COURT: Right.

14 MS. PHILLIPS: Right. So that is why instead of just
15 asking you for a blanket ruling without giving you specific
16 examples, we provided you four pages of direct quotations from
17 every single one of these named plaintiffs. And we're asking
18 you to rule on this exact testimony, this kind of testimony,
19 where they say, right, "Contracts were take it or leave it.
20 Everybody knew that." I mean, that's not based on personal
21 knowledge at all, right.

22 THE COURT: Right. And I think --

23 MS. PHILLIPS: That's problematic.

24 THE COURT: Right, I think Mr. Saveri said they're not
25 going to elicit that. So --

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1 MS. PHILLIPS: Well, but my point is they don't have
2 control necessarily over what they elicit, right.

3 THE COURT: Well, no one has --

4 MS. PHILLIPS: They could ask the question properly,
5 and then we have to deal with it. If you ruled in advance and
6 said, "These kind of examples are exactly what should not be
7 allowed" --

8 THE COURT: I've been doing trials for many years. I
9 could give that instruction. People get on the witness stand --

10 MS. PHILLIPS: Say what they're going to say.

11 THE COURT: -- they get nervous. They say things. And
12 you know what will happen, I will say to the witness, "Please
13 just testify about what you have personal knowledge of." And
14 generally in my experience that works, but I can tell you, for
15 both sides, you all may give instructions to your witness. I
16 guarantee you that your witnesses are not going to follow
17 exactly the instructions that you give them, not because they're
18 bad people, but because it's a difficult thing to do as a
19 witness.

20 But I take your point. I understand. I'm glad that
21 this has been brought to my attention because I agree with you
22 generally speaking. But I think that we'll deal with it as the
23 testimony comes in.

24 MS. PHILLIPS: Understood. Thanks, Your Honor.

25 THE COURT: All right. Thank you.

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1 So I'm just going to, sort of, deny this motion -- this
2 portion of the motion without prejudice to us addressing it as
3 the testimony comes in. So -- oh, yes, this is what I want to
4 talk to you all about, these video clips. We've been looking at
5 video clips, my clerk and I, for a little while. And I'm going
6 to ask you all to, sort of, work some of these things out.

7 But I know, Mr. Cramer, you already talked about some
8 of the things have been pulled. I don't know if you all have
9 met and conferred about the video clips. But if there's been
10 any work on these video clips for either side, it would help us
11 a lot to be able to figure this out.

12 MR. SAVERI: So, Your Honor, to answer your question
13 directly, we haven't really done the work we need to on -- on
14 these video -- well, we're -- we're not talking about video
15 deposition.

16 THE COURT: No, I'm not talking about that.

17 MR. SAVERI: We're talking about videos that were
18 exhibits. We haven't done the work we need to do, candidly,
19 Your Honor. The defendants have a 106, I guess a
20 rule-of-completeness kind of objection. I think what we should
21 do is get-together and work and see if we have any issues about
22 that when we're here next.

23 Some of these video clips, just to be clear, are
24 excerpts because they were used as excerpts with witnesses at
25 depositions. We showed them the excerpt. They adopted those

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1 statements they made at depositions. They are admissions.

2 But to answer your question directly, I think both
3 sides need to get-together and do some more work on that.

4 THE COURT: Okay. Because my concern is I don't -- I
5 can't tell who has the full video clip. Obviously, if there's a
6 full video clip, that should be provided to whatever side.
7 Obviously if the video clip was not previously disclosed, I will
8 tell you now, I'm going to tend not to actually allow it to be
9 offered by either side, unless one witness opens the door to
10 that potentially.

11 But with that sort of direction, I really want to avoid
12 doing video clips today because we've looked at them already and
13 we -- it's a very difficult task to figure them out. And some
14 of them are, like, 10 seconds, right. And I would agree that
15 sometimes it appears that the statements may be taken out of
16 context. You don't even -- sometimes you don't even hear the
17 question, right.

18 So I would like for you all to work that out. And so
19 on the 28th I would like for us to discuss video clips, but you
20 all need to do some work on both sides.

21 And the main issue, though, is if -- I am going to ask
22 you on the 28th, does the full clip exist? Because if it
23 doesn't exist, I will tell you I'm going to tend not to allow
24 it, unless the party against whom it's used has somehow adopted
25 it in a way that would be fair for it to be used against them,

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1 and not simply because the statement was made because that may
2 not be enough. There still has to be context because I don't
3 think it is fair for statements to be taken out of context.

4 MR. SAVERI: Your Honor --

5 THE COURT: Now, we do have these promotional clips,
6 too, that relate to some of the things that Zuffa did in terms
7 of its promotions. And there's some hearsay and other things in
8 there. I want you to get-together on that because obviously
9 hearsay within the video clips is going to be subject to the
10 same issues. And it may make the video clips so essentially
11 excerpted that it's not particularly useful or relevant.

12 So I would like for you all to get-together on that so
13 we can go over in a more coherent manner the video clips on the
14 28th.

15 MR. SAVERI: So that's helpful, Your Honor. I mean,
16 some of these -- some of these video clips come from, you know,
17 shows that were on ESPN or on a network or on YouTube that maybe
18 ran one or two hours, for example. And we don't think it's
19 necessary under 106 or any other rule to show, you know, the
20 whole show, right. And so I -- we're going to have to work
21 through that, but I don't know if you have any kind of sense
22 about how you want to handle that.

23 THE COURT: If you have the whole video, provide the
24 entire video. If either side decides we don't want to show the
25 other 58 minutes of the ESPN show, then they can decide that,

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1 but then they have it. And then potentially I would have it if
2 there are issues that come up about context because I'm sure
3 that there might be.

4 I think where we're going to have more discussion are
5 these promotional videos.

6 MR. SAVERI: Got it. Yes, Your Honor.

7 THE COURT: And what I will say about those, just to
8 give you some preliminary guidance, Zuffa has to be allowed to
9 show how it put things together in a way that demonstrated its
10 acumen. So to the extent that the video clips promoting fights
11 are used to demonstrate how they uniquely did this and how it
12 developed the industry, I will permit them.

13 To the extent it talks from people who are essentially
14 opining almost as experts about certain aspects of relevant
15 theories of the case, I'm not going to permit that, but I will
16 permit a certain portion of these videos to be admitted as a way
17 to demonstrate how they were able to put videos together as
18 highly contributing to the industry.

19 But, again, what I don't want to have are, sort of,
20 these individuals, sort of, opining about this is how they got
21 to be the number one MMA entity was because they had this great
22 acumen. That obviously wouldn't come in, but their ability to
23 say, "This is how we put together fights," even to show what it
24 looks like. I mean, it's helpful I think for the jurors to be
25 able to see what it looks like when you promote an event. And

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1 so they'll be allowed to do that.

2 MR. SAVERI: And, Your Honor, so it does sound like we
3 should go through these things in a -- you know, on a
4 video-by-video basis to deal with the issues that come up, and
5 if we have issues on it, we'll come back. We'll talk about it
6 when we're here next.

7 THE COURT: Okay. Thank you.

8 Any further comments from the defense on this? Okay.

9 All right. I actually think -- I think we've covered
10 all of the defendant's motions in limine. Is that right?

11 MR. YATES: I believe so, Your Honor.

12 THE COURT: Okay. All right.

13 And I think I've already covered the first one for the
14 plaintiffs, which was the witness.

15 Okay. Then there's Document Number 995. Who's going
16 to argue this for the defendant? This is expert testimony.

17 MS. PHILLIPS: That will be me, sir.

18 THE COURT: Ms. Phillips.

19 So I guess, Ms. Phillips, my question is I want to make
20 sure. It sounds like the plaintiffs are saying that you are
21 going to be offering reports and testimony that did not arise
22 during the discovery period.

23 MS. PHILLIPS: So if I may, my understanding of the
24 motion in limine, of course we haven't fully briefed it, but
25 this might be one that might be best handled on the 28th as well

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1 for a couple of reasons. My understanding is the first part of
2 their argument relates to 1006 summaries, and there is a time
3 period set in the pretrial order, right. The parties haven't
4 exchanged those yet.

5 THE COURT: Okay.

6 MS. PHILLIPS: So we haven't put any 1006 summaries on
7 our list. They haven't done that on their side. And so we
8 haven't met and conferred about that and had any discussions
9 about the 1006 summaries. So, you know, it is possible, I don't
10 know because we haven't gotten there yet, whether the 1006
11 summaries from the class cert hearing that they are complaining
12 about may not be on our 1006 summaries now. That's the first
13 thing I'll say.

14 The second thing I'll say is that my understanding is
15 there's an argument with regard to a -- one of the regressions
16 by Professor Topel. And, you know, my understanding on that --
17 again, you know, I think it's a little premature to talk about
18 this, but my understanding is that that regression analysis was
19 part of the stipulation that the parties agreed to. And even if
20 it was untimely, part of the analysis is that it would be
21 harmless to the plaintiffs who have had that regression analysis
22 since 2019 and are objecting to it now. But they've obviously
23 had multiple years to respond to it and to prepare Dr. Singer
24 and Dr. Zimbalist for responding to it at trial.

25 THE COURT: Okay. So let me say this, is if these are

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1 reports that were provided during the discovery period and were
2 subject to hearings that the Court had, I would generally allow
3 them. If they occurred afterwards and there's not an agreement,
4 I'm generally not going to allow them, right. I know that there
5 was an additional expert, for example, that the defendants
6 offered in their motion for summary judgment. I'm not going to
7 allow him.

8 MS. PHILLIPS: Understood.

9 THE COURT: Right. But if there's some dispute,
10 Ms. Phillips, as you're referencing about whether we had agreed
11 to or stipulated to something and it was disclosed, it's a part
12 of the process for those several days of hearings we had, then
13 we can address that on the 28th.

14 MS. PHILLIPS: Okay. Thank you, Your Honor.

15 THE COURT: Thank you.

16 Any questions about that from the plaintiffs' side?

17 MR. MADDEN: No, Your Honor. Patrick Madden for the
18 plaintiffs, for the record.

19 I think it makes sense to handle the summary exhibits
20 with the summary exhibit process, and I believe that we also
21 moved as to Dr. Topel's expert report. It addresses post-2017
22 issues, the one that they filed in July of 2018. And so that
23 would be covered by Your Honor's prior ruling about the
24 post-2017 facts.

25 THE COURT: Well, okay, I want to be clear. There

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1 were -- I have to go back and check it. We had these hearings
2 that occurred obviously well past the class period.

3 MR. MADDEN: Correct.

4 THE COURT: I had not ruled up to that time, I don't
5 believe, in the same definitive way about what could be
6 presented at the hearings. So what I'm saying to you now is
7 that if it's something that an expert was permitted to provide
8 information and evidence on at one of those evidentiary
9 hearings, I'm going to allow it to come into the trial, right.
10 If that included, right, post-class period information, right,
11 we can have a discussion about that, but I'm telling you I'm
12 inclined to allow that if it was part of the back and forth that
13 took place in the course of the Court considering expert
14 discovery.

15 So I wanted to be clear about that, Mr. Madden, because
16 there might have been some testimony that relates to post-class
17 period occurrences at those hearings. I have not gone through
18 and reviewed that testimony with that specific focus, but if
19 that was something that I considered, it was brought up then,
20 that's something potentially that I would allow. I'm saying
21 that because that would be potentially an exception to my, sort
22 of, ruling that I have announced repeatedly about no post-2017
23 information.

24 So I want to be clear about that because it's a little
25 bit of a footnote to that particular ruling. Okay?

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1 MR. MADDEN: Understood. And I just want to be clear
2 about what we believe is in that report, and I don't think it
3 was the subject --

4 THE COURT: Why don't we just wait? We can all figure
5 it out. I mean, we don't have to decide that now.

6 MR. MADDEN: Okay.

7 THE COURT: Let's wait until the 28th. I'm just giving
8 you that, sort of, instruction now so when you come back to me
9 on the 28th -- and we'll have a whole list of things we're going
10 to go through -- I expect that, right, the defendant will say,
11 "Well, we believe that some of this stuff was previously
12 mentioned and should be allowed in." And you all will say, "No,
13 this wasn't," and we'll go through that. We don't need to do
14 that now. I just want to outline for you what I believe will
15 be, sort of, the general parameters in terms of how I would rule
16 on that material.

17 MR. MADDEN: So on the 28th we will have the
18 opportunity to make arguments about what was or was not covered
19 on the class cert hearing within that scope?

20 THE COURT: Right. Well, here's what I would say and
21 I'm going to put the onus on the defendants, which is if you
22 think that there is information in there that is post 2017, but
23 that I allowed to be presented, please identify it because
24 there's no sense of us arguing about material that you're not
25 going to use.

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1 So if I allowed, for example, an expert to opine in the
2 course of the hearing about things that happened post 2017,
3 that's information that should be identified and then you all
4 can have -- we can have a back and forth about it.

5 But what I don't want to have happening, Mr. Isaacson
6 and Mr. Yates, is for you all to bring that up in trial and say,
7 "Well, this is part of that exception you carved out." So that
8 way we can address all of this.

9 I mean, if it's not clear to all of you, one of the
10 things that I want to do with this jury is manage our time in
11 such a way that substantive legal issues get addressed prior to
12 the trial itself.

13 So that's an area where I will allow the defendants the
14 proposed information to be presented that falls into that
15 category. But, again, Mr. Isaacson and Mr. Yates, you need to
16 identify that before the plaintiffs -- before we come to our
17 hearing so that I can then decide and look at that myself before
18 the trial starts.

19 MR. MADDEN: And then I just want to clarify further
20 because I understand what you just said to refer generally to
21 the 2018 Topel report. That's 575.

22 THE COURT: No, no, not that.

23 MR. MADDEN: Okay. That's what I wanted to clarify.

24 THE COURT: No, we had -- I'll go back. We had hearing
25 testimony. Then I allowed supplements. I allowed additional

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1 information, and they provided supplements. I have to go back
2 and look at how that worked. And so I don't want to, without
3 looking at the record again, make a definitive ruling about that
4 because I did allow for additional information to be submitted
5 to me. And so any information that was part of that process
6 potentially is information that I would allow in.

7 Now, if it was submitted, for example, in ways that
8 were inconsistent with what I allowed, you can argue to me,
9 "Well, it was submitted, but in fact that's not what you asked
10 for."

11 MR. MADDEN: Okay.

12 THE COURT: For example, if that's what happened. I'm
13 not saying that happened. If that happened, you can say that.

14 MR. MADDEN: That was our argument, Your Honor. So I
15 appreciate it.

16 THE COURT: But I need to know what it is before I can
17 rule on it.

18 MR. MADDEN: Okay.

19 THE COURT: Okay?

20 MR. MADDEN: Sounds good. Thank you.

21 THE COURT: All right. Uh-huh.

22 Any questions about that from the defense side?

23 Okay. So, I think I already ruled basically and was
24 just discussing 996, which is excluding post-class period
25 evidence. I think I've discussed that.

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1 So then we have this 997 which relates to various
2 aspects of expert testimony. So who's going to be arguing this
3 for Zuffa?

4 MS. PHILLIPS: That will be me again, Your Honor.

5 THE COURT: Oh. Okay, Ms. Phillips.

6 So I guess I will start with -- let me pull this up
7 again -- 997, which is Number 4 on my list. So are you going to
8 say that -- have the experts talk about Zuffa would have spent
9 less money on promoting fighters absent the challenged conduct?

10 MS. PHILLIPS: Yes, that is -- Dr. Topel has disclosed
11 that opinion, has opined on that opinion, has been deposed on
12 that opinion, and he will offer that opinion. And obviously the
13 plaintiffs can feel free to cross-examine him on that opinion --

14 THE COURT: Okay. But how is that part of his
15 expertise? Like, how -- I mean, why can't you just say --

16 MS. PHILLIPS: Sure.

17 THE COURT: -- have the Zuffa executives say that?

18 MS. PHILLIPS: Sure. He --

19 THE COURT: I mean, they could say, which I would allow
20 them to say, "We would have spent additional money or spent more
21 or less money depending upon fights." How is this at all within
22 his particular expertise?

23 MS. PHILLIPS: I think it is squarely within his
24 expertise. He is an expert -- a speciality in microeconomics.
25 Microeconomics is the study of how firms make decisions with

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1 regard to their money, what they spend money on. That is
2 precisely what this --

3 THE COURT: I understand that, but in this case he's
4 going to be opining about what specific people would decide to
5 do, and I'm not sure how that is microeconomics. Microeconomics
6 is trends within that particular field. In this case what
7 you're -- what you would be having him say is, "I know that the
8 Zuffa executives would have spent money on this particular -- in
9 this particular way absent certain conduct." I don't see how he
10 can testify about that.

11 MS. PHILLIPS: I mean, again, I think he's -- right,
12 he's a specialty in microeconomics, and that is the study of
13 how -- how firms operate and how they make economic decisions,
14 right. So if I -- if I am concerned about a fighter that I am
15 investing in leaving because I don't have a contract that
16 ensures he will stay, he is -- this is squarely within his
17 testimony to say that that is -- you know, that that's an issue
18 that then Zuffa is going to invest less in them.

19 The flip side of this, of course, is that he's
20 responding to Dr. Singer's opinion on almost the exact same
21 thing, which is if only the fighters were paid more, they would
22 have then invested more in themselves, right. So if Dr. -- if
23 Dr. Topel can't testify to this, I don't see how Dr. Singer can
24 testify to fighters then coming in and investing more in
25 themselves if they had been paid more.

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1 But I think --

2 THE COURT: And I would -- and I would agree with that
3 as well. I don't think that either expert should be opining
4 about what individual decision makers would do. I think that
5 Dr. Topel could say that, sort of, in terms of how decisions are
6 made profitability can be measured in this way and companies
7 when they invest more in particular goods may spend more on
8 others, generally speaking. I don't think he can say, "Zuffa
9 would have done X." I don't think he can say that just like I
10 don't think Dr. Singer can say, "These specific fighters would
11 have done -- spent their money that way."

12 If you want Dr. Topel to be able to say in some form,
13 sort of, the rational decision that could be made would be
14 spending more on this particular investment or if he spent more
15 on the investment, you'd have less money to spend elsewhere,
16 that's fine.

17 MS. PHILLIPS: As I understand it, that's exactly his
18 testimony.

19 THE COURT: No, no, no --

20 MS. PHILLIPS: These contracts --

21 THE COURT: -- Ms. Phillips. Hold on. He can't say,
22 "Zuffa would have done X." I just want to be clear. He can't
23 say that. I'm not going to allow him to say that. If he wants
24 to talk about what would be a rational economic decision in
25 terms of how you invest your money and that's consistent with a

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1 pattern, he can say that.

2 MS. PHILLIPS: Okay.

3 THE COURT: But what he can't say is, "Zuffa would have
4 spent less money, right, on promoting fighters absent" -- he
5 can't say that. He can't opine about that specifically with
6 respect to them just like, you are anticipating my argument, I'm
7 not going to let Dr. Singer talk about what the fighters would
8 have done either. If Zuffa executives want to also come up and
9 say that, they can say that because they were decision makers,
10 right, you know.

11 We can talk about whether or not that's speculation or
12 not, but that's going to come in a little bit anyway so we can
13 go back and forth. But I would potentially allow Zuffa's
14 executives to talk about that. I'll potentially allow the
15 fighters to talk about that. But I'm not going to have the
16 experts opine about what executives would have done or what the
17 fighters would have done. At most what they can say is if an
18 entity spends more money on this particular type of expenditure,
19 they may have less money to spend on other expenditures and it
20 would be reasonable for that to be the case. They can say that,
21 but not about that, for either side.

22 MS. PHILLIPS: Okay. Understood.

23 THE COURT: All right?

24 MS. PHILLIPS: Thank you, Your Honor.

25 THE COURT: Any question about that from the

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1 plaintiffs' side? Because I'm going to do the same thing with
2 Dr. Singer, right. I'm going to restrict the experts to the
3 things that I think relate to their expertise, and I don't think
4 speculating about what choices either the fighters would have
5 made or Zuffa would have made matter.

6 Anything on the plaintiffs' side?

7 MR. CRAMER: No, Your Honor.

8 THE COURT: Okay. All right.

9 Ms. Phillips, are you still -- are you on Richard
10 Marks, too?

11 MS. PHILLIPS: Yes, I am.

12 THE COURT: You know, we should just have you stay
13 there until --

14 MS. PHILLIPS: Yes. Sorry. Sorry. Just give me -- I
15 apologize. Just give me a minute to get it right.

16 (Defense counsel conferring.)

17 MS. PHILLIPS: I apologize, Your Honor.

18 THE COURT: Take your time. I mean, we have -- all
19 have to get our notes out.

20 So you've seen this motion. I want to understand, what
21 is it Mr. Marks is going to be talking about?

22 MS. PHILLIPS: Sure.

23 So Mr. Marks will testify that the structure of
24 contracts in Hollywood is very comparable, right, the
25 entertainment industry, very comparable to the structure of the

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1 contracts at issue here. And that, right, competition or
2 rather, you know, a lack of competition does not inevitably flow
3 from contracts where the revenue share is at that 18 to 20
4 percent because what --

5 THE COURT: I'm sorry. So are you offering him as an
6 expert? Because I don't know how he talks about this if he's
7 not an expert.

8 MS. PHILLIPS: We are offering him as an expert, yes.
9 And I don't believe that his expertise has been challenged.
10 There was no Daubert on Mr. Marks.

11 THE COURT: Okay. Okay. Go ahead. Keep going.

12 So he's going to talk about this structure. I want to
13 go back. I want to make sure I'm looking at the right ...

14 MS. PHILLIPS: Sure. And if I can help, Your Honor,
15 it's at 997. It's 8 of 18 is where it begins, I believe.

16 THE COURT: Right. Okay.

17 MS. PHILLIPS: So they have moved to strike him under
18 401 and 403. They have not argued that he's not an expert, and
19 they have not argued -- have not Dauberted him.

20 THE COURT: There we go. Okay. Go ahead.

21 MS. PHILLIPS: So he will testify, again, that the
22 structure of the contracts in Hollywood are similar to the
23 structure of the contracts here. And what he will testify to is
24 that there is a competitive market where there is a lower
25 revenue share, just as there is here, a competitive market with

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1 a lower revenue share. And that is what he is being proffered
2 to testify to.

3 As I understand the argument in the motion in limine,
4 they argue that he has not demonstrated that the entertainment
5 industry is a benchmark, but the reason that Dr. Zimbalist talks
6 about the other professional sports being benchmarks is because
7 it is their burden under the yardstick theory that they have put
8 forward in this case with regard to damages. That's not what
9 Mr. Marks is going to do.

10 THE COURT: Okay.

11 All right. Thank you, Ms. Phillips.

12 MS. PHILLIPS: No problem.

13 THE COURT: I'm sorry. It's Miss?

14 MS. NOTEWARE: Noteware. Good afternoon, Your Honor.
15 A fresh face for you.

16 THE COURT: Okay. There we go. Well, I'm glad you all
17 have spread it all out. I appreciate that.

18 MS. NOTEWARE: This is completely irrelevant evidence.
19 We're in -- we're talking about sports. We're talking about the
20 MMA. We're talking about the UFC. This is an entertainment
21 lawyer talking about contracts in old Hollywood that has nothing
22 to do with this case.

23 THE COURT: Okay, Ms. Noteware. But my question to you
24 is we've had a time for Daubert and other motions. Is it purely
25 your argument that this is a relevance objection?

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1 MS. NOTEWARE: Yes. This is relevance, confusion to
2 the jury --

3 THE COURT: Well --

4 MS. NOTEWARE: This is two ships passing in the night
5 here. This is not -- this has nothing to do with the case.
6 It's not a Daubert motion because we're not saying that he isn't
7 a qualified entertainment lawyer. And if this was a case --
8 perhaps, if this was a case about something else, he would be
9 perfectly able to opine about this.

10 THE COURT: So then why wouldn't you have moved to
11 exclude him as an expert previously?

12 MS. NOTEWARE: Because it wasn't a Daubert challenge.
13 It's a relevance challenge.

14 THE COURT: Well, you know, it's partly a Daubert
15 challenge because you're partly saying that he is not an
16 appropriate yardstick for this industry. That's something an
17 expert would opine about. And the question is whether or not he
18 has the expertise to do that, right. You're essentially saying
19 to me he doesn't have the expertise to opine about this
20 particular industry because he's come from a very different
21 industry.

22 MS. NOTEWARE: I am -- actually, I'm not saying that,
23 Your Honor. I'm just saying this is something that would
24 confuse the jury because we're going to have someone get up
25 there who, again, may be a very qualified entertainment lawyer,

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1 but that's not what he's testifying. He's testifying in a case
2 that he has no business being in. And it's going to confuse the
3 jury. Just like you wouldn't have likeness rights, that would
4 confuse the jury in Your Honor's estimation. This is something
5 that's just wholly far afield from this case and really has no
6 place here. And it's not responding to anything from the
7 experts. It's not responding to testimony from any of the
8 witnesses --

9 THE COURT: Well, no, it's offering -- it's responding
10 to Dr. Zimbalist's offering particular yardsticks, and he's
11 offering his -- a different version, right, of, you know, a
12 comparator. I mean, I may or may not agree with that, but
13 that's not really the issue, right.

14 What you're asking me to do is to find that his area of
15 expertise, I guess, is not appropriate in this industry. And
16 that seems to me to be something that's an area that should have
17 been brought up previously.

18 I just get concerned because we've been through a fair
19 amount of briefing in this case about experts and --

20 MS. NOTEWARE: I understand.

21 THE COURT: -- so for me to hear what feels to me like
22 a motion to exclude an expert partly on Daubert grounds because,
23 again, you're going to be arguing that this isn't a proper
24 comparator within the industry. That's saying an expert's
25 opining about something outside of their expertise or in an area

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1 that is not appropriate. It's not that it's just not relevant;
2 he's not an appropriate expert for this particular area.
3 That's -- that to me is a basis for a motion to exclude.

4 So I'm a little concerned about the timing of how this
5 is being brought to me at this point in time.

6 MS. NOTEWARE: And I can understand that. That's a
7 fair concern, Your Honor, but this really is not a Daubert
8 motion. It really is just this --

9 THE COURT: No, it's not a Daubert motion, but you're
10 excluding -- he's being offered as an expert, right. We had --
11 both sides had extensive --

12 MS. NOTEWARE: Absolutely.

13 THE COURT: -- motions filed about excluding experts.
14 I'm wondering why this particular expert wasn't the subject of
15 those motions.

16 MS. NOTEWARE: I can't speak to that at this moment as
17 to why that was, but I can tell you that looking at it now
18 there's no good reason for this expert to testify about actor
19 services in this case. It's just not relevant to anything that
20 we're doing here.

21 THE COURT: The problem is, Ms. Noteware, is we had
22 hearings about experts, right. The time to have brought this to
23 my attention so I could have heard him was then. Then I would
24 be able to make a determination, and now you're asking me to
25 make a determination not having heard him. I mean, we had a few

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1 days of experts coming in to testify. I would have been in a
2 situation where I could have then evaluated to what extent it
3 was inappropriate compared to it.

4 Simply because the nature of the industry might be
5 different doesn't mean that it couldn't align. We had experts
6 talking about the relevance of Microsoft as relates to
7 determining marginal revenue product. So that was testimony
8 that I heard. So I'm a little concerned about the timing of
9 this in the context of this case.

10 Let me hear from the defense, and then I may have you
11 come back up. Thank you.

12 MS. NOTEWARE: Okay. Thank you.

13 THE COURT: Ms. Phillips.

14 So, Ms. Phillips, notwithstanding what I said to
15 Ms. Noteware, I still have to determine relevance as relates to
16 an expert's testimony. I'm a little concerned again about the
17 timing of when this was brought to my attention because I would
18 have had more opportunity to be able to prepare and to be able
19 to review the testimony and hear from the witness directly.

20 So I want you to talk to me about, notwithstanding the,
21 sort of, issue of, sort of, the timing of this opposition, why
22 you think this still wouldn't be subject to me having to decide
23 whether or not his expertise would be misleading or confusing to
24 the jury. Because I would still have to make that
25 determination, right.

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1 There's still a 403 analysis and a 401 analysis which
2 can technically be brought at this time. So explain to me why
3 you believe this wouldn't be confusing.

4 MS. PHILLIPS: Sure.

5 So Dr. Zimbalist has proffered a number of different
6 yardsticks in the professional sports world, right. And what
7 Mr. Marks is doing in response to that is giving another kind of
8 yardstick, which is the entertainment industry where the actors
9 are the product just like the plaintiffs here say that the
10 athletes are the product. And what he testifies to, and he is
11 an expert in this, is that the market for actor services is
12 highly competitive and it is nowhere near 50 percent of a
13 project's gross revenue. So that's directly relevant to what
14 Dr. Zimbalist argues and what the plaintiffs themselves argue.

15 THE COURT: Okay. All right. Thank you, Ms. Phillips.

16 MS. NOTEWARE: Your Honor, this is not a case where the
17 defendant is saying that the relevant yardstick is the acting
18 industry. Nobody is contending that in this case. And it's
19 just completely irrelevant to what we're doing, and to bring in
20 this other industry into this case just seems like opening up a
21 door to a whole mini trial about the entertainment industry
22 that -- that has no purpose here.

23 THE COURT: No, they're offering it for a very specific
24 purpose, which is to say we think there is a more comparable
25 yardstick, even though it's not technically within the combat

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1 sports industry or the sports industry. But where you have a
2 situation where in the market the particular individual is the
3 product and it's competitive, there's still differential parts.

4 Why can't you simply argue, right, that this is not the
5 same? You don't have bouts. You don't have fights. I mean,
6 you could argue all of that. I mean, I'm not going to stop you
7 from questioning Mr. Marks and saying, you know, "This is not
8 related to sports in the particular ways, and you don't have any
9 expertise in that," right. "You haven't studied that as an
10 economist," right. You could argue all of that, right?

11 MS. NOTEWARE: We certainly could argue all of that.
12 And obviously we would if this irrelevant evidence comes in, but
13 what is the point of putting something that has nothing to do
14 with this case in front of the jury?

15 THE COURT: Well, because they think it does and they
16 have to be allowed to be able to present it. So here's what
17 I'll tell you.

18 MS. NOTEWARE: But they --

19 THE COURT: So, Ms. Noteware, for now I will review it.
20 If you have objections to particular aspects of the testimony,
21 you bring that to me on the 28th. But for now I will allow
22 Mr. Marks to testify.

23 MS. NOTEWARE: I will -- I will be back on the 28th
24 with this, but I would ask you to look at the expert reports, as
25 I'm sure you have done. And this --

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1 THE COURT: I have. I'm sorry. Go ahead.

2 MS. NOTEWARE: I'm sorry. This just responds to a
3 single footnote. This was an offhand comment that was made
4 about the studio system in the 1940s or something like that.
5 And now they've done this expert report, and we're just -- we're
6 opening a door to just something that has nothing to do with
7 this case.

8 THE COURT: So let me just be clear, Ms. Noteware. I'm
9 not going to allow three days of testimony about the
10 entertainment industry. What seems to me to be something that I
11 would potentially allow at this point is for him to describe a
12 scenario which we had testimony about where you have the
13 individual as the product and to be able to say that it's not
14 always the case that the individual's the product results in a
15 percentage of a particular revenue stream. To the extent that
16 they're offering the testimony, that's what I will potentially
17 allow it for.

18 So when you would come back on the 28th, you can talk
19 to me about what you think or how that should be limited, but
20 for now I will allow that testimony. I'm not going to allow
21 days of testimony about the entertainment industry, but for that
22 I will allow it for now.

23 MS. NOTEWARE: But, again, it's the entertainment
24 industry --

25 THE COURT: Ms. Noteware, I've already decided we will

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1 come back on the 28th.

2 MS. NOTEWARE: Thank you, Your Honor.

3 THE COURT: All right. Let's see. Aggregate damages.

4 Oh, Mr. Chiu. Okay.

5 So, Mr. Chiu, this sort of seems to fall into the
6 conversation we had earlier about how damages should be
7 calculated. As you know, they're going to get a damages
8 instruction.

9 MR. CHIU: Yep.

10 THE COURT: And this relates also to mitigation of
11 damages, right?

12 MR. CHIU: Right.

13 THE COURT: And certainly neither expert is going to be
14 able to say, "This is how damages is supposed to be calculated,"
15 right. You could point to how given the instruction the damages
16 calculation is not appropriate or accurate or reliable, but
17 certainly I'm not going to allow one side to argue this is how
18 you argue or how you determine damages that's inconsistent with
19 what the instructions would be, which is why we will come back
20 and have the instructions --

21 MR. CHIU: No, I don't think that is what we intend to
22 do with this. And I want to take the two MILs together, 6 and
23 7, because they're kind of the converse of each other, right.
24 The first one is they're trying to say, "We shouldn't be able to
25 have testimony and argument about the fail -- the failure to

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1 disaggregate damages." And then the flip side of that is oddly
2 that we also can't argue that Dr. Singer didn't aggregate
3 damages.

4 But I think the issue here is, first, both our experts
5 disclosed these opinions, and it's not -- it's not the issue
6 about saying this is how you calculate damages. It is really
7 about the fact that Dr. Singer's offering an opinion and a
8 calculation of damages that he claims is the result of this
9 overarching scheme.

10 And our experts critique that and say, "Look, you know,
11 he has no way of actually discerning which components of the
12 scheme contributed to this overall number." That is at issue.
13 Those opinions were disclosed. They never changed those
14 previously, and those should be fair game.

15 THE COURT: Okay. Well, let me hear from the
16 plaintiffs on that particular point.

17 So, Mr. Cramer, as I've indicated, I'm going to give
18 instructions on the damages. The defendants are allowed to say,
19 "In order for the damages to be reliable and reasonable based
20 upon what the standard is, there should be a way to measure how
21 the anticompetitive -- alleged anticompetitive conduct and
22 scheme specifically contributed to the damages." What's wrong
23 with them saying that?

24 MR. CRAMER: They can say that. What they can't --
25 cannot say or should not be able to say is that the plaintiffs

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1 in a scheme case where all of the conduct is interrelated, as
2 Your Honor found in the class order, the contracts, the
3 acquisitions, and the coercion act together to cause harm, they
4 can't say that there's some defect because plaintiffs' experts
5 didn't separate out the different strands. It's impossible to
6 separate out the different strands.

7 THE COURT: So that's going to lead back to one of the
8 things we're going to do homework on the 28th, which is, for
9 example, the experts have different models even for measuring,
10 sort of, what would be a competitive wage, right. And so we
11 have to find a way where they can challenge, you can challenge,
12 the experts' methodologies as reliable without the jury imputing
13 to those challenges them reflecting the standard that has to be
14 proven. And that's what we'll have to do on the 28th.

15 I agree with you that they cannot, as you cannot, sort
16 of, argue that there is a particular way in terms of the
17 methodology, in terms of the specific factors to be considered,
18 that damages have to be calculated under the law. That is not
19 required.

20 But there are standards of reliability and
21 reasonableness that do apply, right, and there are certain
22 factors that the jury has to consider.

23 So I think what we'll have to do is come back and again
24 look at the instructions, and then we'll make that
25 determination. And then we'll talk about some of that again on

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1 the 28th in terms of what people will be allowed to say and not
2 say, but that will occur in the context of the jury
3 instructions. Because I will allow both sides to be able to
4 challenge the reliability of the other sides' experts. The
5 question is how they say that and how they do that. So we'll
6 come back and talk about that.

7 MR. CRAMER: Fair enough. Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 That also just brings me to a point that you all should
10 be aware of generally in terms of how I run trials. I give
11 preopening instructions and you will have them. So you will
12 have a set of instructions that I decide before the opening,
13 before you prepare your openings. And I will read those to the
14 jury before they hear your opening statement.

15 So there will be -- and we can modify them potentially
16 as the trial comes in, but I will decide the substantive
17 instructions before opening. You'll have them. The jurors
18 won't have a copy of them because they're not the final
19 instructions, but I will read them to them. So before you do
20 your opening, I will go through and read preopening instructions
21 to the jurors. And I think that's particularly important in a
22 case like this, right.

23 And to a certain extent, and we can talk about this, I
24 will allow you all to reference those instructions prior to your
25 closing arguments as a way to be able to make sure we stay

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1 within the bounds of what the Court has determined will be the
2 instructions, right.

3 And how that objection comes in will be different, but
4 essentially your objection would be, you know, "Your Honor,
5 objection, invades the province of the Court as relates to the
6 definition of monopsony power or the definition of damages."
7 That's how you would alert me to that, and then we would look at
8 how that's defined.

9 But you all will have that information ahead of time,
10 and then we can talk about, sort of, again how that gets shared.
11 That also brings me to another point. I have decided in this
12 case that I will allow the jurors to ask questions of at least
13 the experts. What that looks like is, and I've done this
14 before, at the end of the direct and the cross the jurors will
15 be asked to hand up questions to me. I will look at them to see
16 if they are an appropriate question. I will read the question,
17 and then the witness will be asked to answer it. If it's not an
18 appropriate question, I will not read it and you will not see
19 it. Okay?

20 And, certainly, if you think for some reason the
21 question's objectionable that I am reading out loud, you can
22 still object to it even though it's me reading it. So I want to
23 be clear about that. It's different than me making a ruling on
24 a particular objection from either party, right.

25 And so at least for the experts I will allow these

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1 questions to be presented. And most likely, and I'll let you
2 all know by the 28th, I will allow the jurors to ask questions
3 of all of the witnesses, right. And we can discuss that --
4 Mr. Saveri, yes?

5 MR. SAVERI: I'm sorry. When you're done, I have a
6 question about what you just said.

7 THE COURT: Go ahead.

8 MR. SAVERI: I'm sorry. Joseph Saveri, Your Honor.

9 If you have a juror question, it puts us in a very
10 difficult position to object to it after you've asked it. And
11 so is there a mechanism for dealing with that before the
12 question is asked?

13 THE COURT: No.

14 MR. SAVERI: Okay.

15 THE COURT: Right. And that's a strategic decision you
16 have to make. I will tell you, I find it to be a very useful
17 process. It will add time, but in a case that's this
18 complicated I actually think it will be helpful and add to the
19 process. But you're right. You have to make a decision about
20 whether or not you want to object to the question.

21 MR. SAVERI: 100 percent, Your Honor. And I find the
22 opportunity to have jurors ask these questions even of lay
23 witnesses to be very informative, and that's kind of what we're
24 doing here. I just wanted to make sure we are clear --

25 THE COURT: No, you can figure out how you want to

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1 delicately do that, but you can do it at your own choice.

2 MR. SAVERI: Thank you, Your Honor.

3 THE COURT: Okay. And if you have questions about
4 it -- I don't know if any of you have participated in a trial
5 where that's happen before. I would hope at this point in time
6 you all have. If you have questions about the process, as
7 Mr. Saveri did, let me know. But that's the process.

8 And typically what I also do is ask all of the jurors,
9 even if they don't have a question, to write down "no question"
10 so that there's no indication of who's asking the questions or
11 not.

12 Yes?

13 MR. SAVERI: I didn't mean to walk away from you when
14 you were still addressing me.

15 THE COURT: Oh, no, no. No, no. That's all right.

16 MR. SAVERI: That's very helpful. Thank you, Your
17 Honor.

18 THE COURT: Okay. Let's go back to our ...

19 Number -- let's see. We're at 999. Who's going to be
20 arguing this for the defendant? This is the mitigation of
21 damages.

22 MS. PHILLIPS: Me again.

23 THE COURT: Okay.

24 So, Ms. Phillips, I'm trying to understand what even
25 mitigation means in this context.

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1 MS. PHILLIPS: Me, too, Your Honor. Because I think,
2 and my team will correct me if I'm wrong, but we may be ships
3 passing in the night here and this might be a situation where an
4 opposition would have been helpful. So let me just see if I can
5 do it.

6 What we want to make sure that we can preserve our
7 ability to do is argue about fighter mobility. Fighters could
8 leave UFC and go to competitor promotions.

9 THE COURT: Right.

10 MS. PHILLIPS: And fighters could leave competitor
11 promotions and come to UFC. We are not planning on, for
12 example -- I'm using this just purely by example. We are not,
13 you know, going to ask Plaintiff Cung Le, for example, who
14 retired from UFC, "Well, why didn't you go out and get another
15 UFC or another MMA job?" Right. We're not going to argue that.
16 We're not going to say you failed to mitigate damages because of
17 that.

18 What we want to be able and we need to be able to
19 argue, which is directly, right, in response to their entire
20 case, is that fighters do freely move between UFC and
21 competitors.

22 THE COURT: Right. And the contracts were not
23 restrictive, as they argued.

24 MS. PHILLIPS: Exactly. And so, you know, I think
25 based on the way that this ultimately ended up getting written

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1 and submitted to the Court, we are not trying to make arguments
2 about this kind of mitigation of damages. We are just saying
3 that we need to be able to introduce evidence of mobility.

4 THE COURT: Okay.

5 MS. PHILLIPS: And, again, if I've got that wrong, my
6 team will let me know.

7 THE COURT: All right. Perfect. Thank you.

8 All right. On the plaintiffs' side?

9 MR. CRAMER: Sounds like there was a misunderstanding.
10 Obviously we dispute the mobility point. There's a lot of
11 evidence against that, but that's a separate issue and doesn't
12 have to do with mitigation of damages.

13 THE COURT: Okay. Well, is that the same for the
14 reference to the contracts between Universal Strength
15 Headquarters and employees?

16 MR. SAVERI: We would -- we would -- excuse me, Joseph
17 Saveri. Your Honor, we think the same logic applies.

18 THE COURT: Okay. So, look, I don't think that
19 they're -- from what I've heard that they're not arguing about
20 being able to bring in evidence about individual compensation.
21 I mean, I think they can say that there are other ways people
22 could compensate themselves if there's an argument that says --
23 for example, the plaintiffs argue -- if the plaintiffs argue
24 this was their entire livelihood and they couldn't make money
25 elsewhere, then this would open the door to that. But other

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1 than that, I'm not sure how this is relevant. But let's hear
2 from the defendant to see what they might be offering.

3 MR. JOHNSON: Yes, Your Honor. This is David Johnson
4 for the defendant.

5 I just want to make sure. You're referring to --

6 THE COURT: Well, hold on. The court reporter can't
7 hear you unless you're in front of the microphone, Mr. Johnson,
8 so ...

9 I'm sorry. I'm referring to -- it's plaintiffs'
10 Document 999. There's a -- they are seeking to exclude evidence
11 or reference to contracts between Universal Strength
12 Headquarters and its employees or between Le and Universal and
13 evidence of plaintiffs' non-UFC businesses.

14 Is there any -- is there going to be, excuse me, any
15 attempt to offer that type of evidence by the defendant? And to
16 the extent that you are going to be offering it, what's it going
17 to be offered for?

18 MR. JOHNSON: Yes, Your Honor. There is very specific
19 types of evidence that would fall into these categories. I
20 guess I'll address the two motions separately because they
21 relate to different types of evidence. The first one relating
22 to the Universal Strength contracts, this really doesn't have
23 anything to do with the mitigation MIL that was previously being
24 discussed. This is an example of named plaintiff, Mr. Le, was
25 managing or running an MMA gym or team. This is before he began

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1 fighting for UFC.

2 And there are two parts of his management of that MMA
3 team that are directly relevant to the issues in this case, one,
4 the types of contracts he entered into with the fighters that
5 were under his management and then, two --

6 THE COURT: Why is that relevant? Look, the issue is
7 whether or not in this particular instance, right, Zuffa's
8 contracts were restrictive. And I actually wrote in my order
9 the fact that other entities might have used similar contracts
10 doesn't actually make the contract less allegedly pro or
11 anticompetitive. So why would it be relevant?

12 MR. JOHNSON: Well, Your Honor, maybe this would be a
13 better MIL that we best discuss in the context of the jury
14 instructions when we get there, but one of the jury instructions
15 that we would be arguing for would come directly from the
16 American Bar Association's model for civil antitrust cases. And
17 within that model it says explicitly that one of the factors
18 that jurors must consider when evaluating the procompetitive or
19 anticompetitive nature of exclusive contracts is, quote, The
20 nature and history of the use of exclusive dealings -- dealing
21 contracts in the industry.

22 So it's something that the jury is going to be told,
23 presumably. I will discuss jury instructions at the next, you
24 know, proceeding. But it's in the model instruction and it's in
25 the case law as well. The use of the challenged contract among

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1 other industry participants is directly relevant to the
2 legitimate business rationale for the contracting practice in
3 the first place.

4 So we're not arguing that Mr. Le's use of exclusive
5 contracts with his fighters was anticompetitive by Mr. Le. In
6 fact, we're kind of arguing the opposite. What we're --

7 THE COURT: You want to say that that's the industry
8 standard and it's procompetitive.

9 MR. JOHNSON: We're saying that there are legitimate
10 business rationales for Zuffa to have entered into exclusive
11 agreements just as there are legitimate business rationale for
12 Mr. Le to have entered into exclusive agreements with his
13 fighters under management. They're likely the exact same
14 rationale. He's investing his time, his money, his energy into
15 the development of these fighters. That's exactly what Zuffa
16 did. It's part of the justification for Zuffa's exclusive
17 contracts. So that's why it's relevant.

18 Plaintiffs' case in part, as I understand it, is that
19 there were no legitimate justifications for Zuffa to use these
20 contracts. Maybe I have that wrong, but I believe I've seen
21 that before.

22 And the fact --

23 THE COURT: Well, look, I think this does raise an
24 issue which we're going to have to deal with which is, as you
25 know, and the experts are going to talk about, the type of

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1 conduct you engage in when you don't have market dominance or a
2 significant market share is very different than what you can
3 engage in when you do have it. And so what might be allowed,
4 right, when you are a startup is not going to be allowed by
5 Microsoft and Google, right, and the law is pretty clear about
6 that.

7 And you're right that raises an issue about how we
8 address that because I do think we have to address the issue of,
9 as Zuffa or as UFC started, there might have been a legitimate
10 basis for doing so. At a certain point, as you know -- this is
11 unfortunately the way that antitrust law works. At a certain
12 point when you become dominant enough in an industry, what got
13 you to that point is no longer permissible.

14 So we can address that. Because I don't disagree with
15 you to the extent that there may be some potential relevance to
16 explaining how these contracts came about in the industry, but
17 we still have to address the issue, Mr. Johnson, of the fact
18 that at a certain point, to the extent it's established, Zuffa
19 couldn't continue to operate in the same way because of its
20 dominant market power. And so we'd have to figure out how to
21 address that.

22 So I think you're correct, actually, the best way to do
23 this would probably be to look at what the jury instructions
24 say. But I did want to at least foreshadow that particular
25 issue because I think it's actually also another little sticky

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1 issue, which is the way that antitrust law works is what you can
2 do when you're small doesn't necessarily work and is allowable
3 when you get bigger, right. And no one's really disputing that.
4 The question is how do we allow for the jury to understand that
5 in the context of the evidence they receive.

6 So why don't we wait on this one? I agree with you on
7 that.

8 MR. JOHNSON: Okay. So that was plaintiffs' Motion
9 Number 10, I believe, Your Honor.

10 THE COURT: Okay.

11 MR. JOHNSON: The second one was plaintiffs' Motion
12 Number 11. This is also within Docket Entry 999. This is the
13 evidence about plaintiffs' non-UFC businesses, and I would like
14 to address that. I think it's a different category of evidence
15 and --

16 THE COURT: Yeah. No. Yes, I do want you to address
17 that, too.

18 MR. JOHNSON: So at the outset I'd like to direct the
19 Court's attention, in this motion I think it's the third
20 sentence in plaintiffs' motion. It's Page 9 of their motion.
21 What plaintiffs write in support of this motion is: "What
22 plaintiffs or other class members decide to do after they left
23 the UFC is plainly irrelevant to any claim or defense in this
24 case."

25 That cannot be correct.

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1 THE COURT: Why?

2 MR. JOHNSON: If fighters were fighting for UFC and
3 then left to fight for --

4 THE COURT: Oh, you mean -- you're talking about within
5 the class period?

6 MR. JOHNSON: Within the class period.

7 THE COURT: Yes, yes.

8 MR. JOHNSON: Within the class period, Your Honor.

9 Yes. The subject of this motion is within the class period.

10 THE COURT: So if you're talking about the introduction
11 of evidence of fighters' mobility to different promoters or
12 entities involving fighter services, I would agree with that.
13 That's not what I understand them to be trying to exclude.

14 Well, let me ask -- before you go on, Mr. Johnson, let
15 me ask whoever's going to be arguing this for the plaintiffs if
16 that's the issue. Because if it's simply -- why don't you stay
17 there, Mr. Saveri, so that Mr. Johnson can stay here, and pull
18 that microphone in front of you. Right.

19 You're not saying that they can't bring in evidence of
20 fighter mobility within the class period, are you?

21 MR. SAVERI: No, we're not.

22 THE COURT: Okay. So then what is it --

23 MR. SAVERI: The motion goes to conduct that occurred
24 before, including an MMA effort that never even got off the
25 ground in Argentina. So this is relevancy. It's beyond the

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1 scope. Within the scope of the class period I don't think we
2 have any objection to the kind of evidence that they're talking
3 about.

4 MR. JOHNSON: If I may, Your Honor.

5 THE COURT: Okay.

6 MR. JOHNSON: That should be the end of this motion in
7 favor of defendant because the conduct that they're complaining
8 about was during the class period. They're trying --

9 THE COURT: So I'm sorry. So, Mr. Johnson, then what
10 is it that you want to be offering? So just so we're all clear.

11 MR. JOHNSON: I raised the sentence that they included
12 in their motion to show that it was overbroad, the motion. The
13 specific context -- conduct that they're discussing is from
14 2012. It's in the heart of the class period. And what former
15 named plaintiff, I guess Mr. Quarry, who's not a member of the
16 bout class, but is on plaintiffs' witness list and is planning
17 to testify at this trial, when he ceased fighting for UFC, he
18 went and participated in an effort to start a new MMA promotion.

19 It was --

20 THE COURT: In South America.

21 MR. JOHNSON: It was in South America.

22 THE COURT: Okay. But that was not the defined market
23 that I set up for my order, right. So how is that relevant? I
24 mean, I was very clear about -- we had to go through this whole
25 definition of the market, where it is. It doesn't include

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1 Russia. It doesn't include China. So how is this relevant,
2 South America?

3 MR. JOHNSON: So, Your Honor, Your Honor said that the
4 relevant geographic market that plaintiffs must prove or their
5 case fails is the United States. Is that -- is that --

6 THE COURT: Yes, it's in the order. It was actually --
7 I mean, it was broader -- a little bit broader. At certain
8 points I think I talked about North America, but it certainly
9 didn't include South America.

10 MR. JOHNSON: Okay. And so if there is a viable
11 employment option for fighters outside of the geographic market
12 that they must prove or their case fails, then their case fails.
13 If we prove that there are employment options outside of the
14 relevant market, it goes directly to their proof of the -- the
15 geographic market being narrower than that. Just because their
16 theory and what they must convince the jury of is that the
17 relevant geographic market is narrow, in their view I guess the
18 United States or maybe North America, that doesn't mean we don't
19 get to contest that contention. That's what we will do at the
20 trial. We'll show that these athletes actually have
21 opportunities to fight for promotions outside of that geographic
22 market and, in fact, multiple of -- or the named plaintiffs did
23 that exact thing.

24 And the effort of Mr. Quarry to go to South America and
25 start an MMA promotion, it is relevant to that geographic market

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1 question because his e-mails, which he wrote during the class
2 period, show that when he was attempting to start this MMA
3 promotion, he was considering fighters from all over the world,
4 including fighters in the U.S., including one of the named
5 plaintiffs in this case, Mr. Jon Fitch. And he wanted to bring
6 them to fight for his promotion in South America.

7 So that's just one of the theories of relevance for
8 this evidence. It goes to rebutting their claim that the
9 geographic market is so narrow when we believe it's in fact
10 global. There are additional theories of relevance for this
11 evidence. In particular, Mr. Quarry, he's participating in this
12 effort to start an MMA promotion in South America. He writes
13 these documents during the class period, and some of the things
14 he's talking about are, "Oh, who are the fighters that I would,
15 you know, want to bring in to fight for me at this promotion?
16 Are there any fighters available?"

17 In these e-mails he says, "Yes, there are fighters
18 available." He doesn't say, "Oh, there's no opportunity to
19 bring in ranked or high quality fighters." He says the
20 opposite.

21 THE COURT: So, I'm sorry, the argument is going to be
22 that Mr. Quarry's testimony about attempting to start up an MMA
23 promotion or MMA entity in South America demonstrates that, in
24 fact, the definition of the relevant geographic market is
25 inaccurate and that, in fact, there were true opportunities for

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1 fighters based here in North America to go to South America.

2 MR. JOHNSON: That's one of the theories of relevance,
3 Your Honor. It goes directly to that, but it also goes more
4 directly to rebutting plaintiffs' claim that these contracts --
5 Zuffa's use of exclusive agreements has locked up so many
6 fighters that there are not enough fighters available for other
7 promotions. It goes to barriers to entry. It goes to fighter
8 mobility.

9 Mr. Quarry's statements that there are fighters
10 available for him to use for his promotion directly undermines
11 plaintiffs' evidence to that point.

12 He also discusses fighter compensation and what would
13 be considered fair for him to pay his fighters if he were to
14 start this promotion. He also weighs in on the value of a fight
15 performed by a named plaintiff in this case, Mr. Fitch. At the
16 exact same time that Zuffa is paying Mr. Fitch \$100,000 or more
17 for a single fight, Mr. Quarry, when considering what fighters
18 he might want to hire, opines that a Jon Fitch fight is worth
19 absolutely nothing, no one wants to see it.

20 So plaintiffs are claiming that Zuffa underpaid Jon
21 Fitch by giving him \$100,000 and an opportunity to earn even
22 more if he won at the exact same time that one of the other
23 plaintiffs is saying, "There's zero value to Jon Fitch fighting.
24 No one wants to see it."

25 It's -- it's directly relevant, Your Honor, to

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1 rebutting plaintiffs' case --

2 THE COURT: Well, let me decide that, Mr. Johnson.

3 MR. JOHNSON: Of course, Your Honor, of course. You're
4 the ultimate decider of this.

5 THE COURT: I appreciate your arguments here. Let me
6 let the plaintiffs respond.

7 MR. JOHNSON: Yes, Your Honor.

8 MR. SAVERI: Thank you, Your Honor. Joseph Saveri
9 again.

10 I think it's fair to say that Mr. Johnson overstated
11 the record a little bit. I think Your Honor is absolutely
12 correct that this is far outside the relevant market. I was
13 incorrect when I said it was Argentina. It was really Uruguay.
14 This was --

15 THE COURT: So the question I have for you, though,
16 Mr. Saveri is this. Would the defendants not be permitted to
17 say, for example, let's say it was in the record, "You could
18 travel to Mexico and make twice the money. So the extent to
19 which there was restriction on fighters, that actually is not
20 the effect because there are readily available options."

21 Now, you could argue potentially, "This never
22 materialized. That demonstrates the exact opposite." But why
23 wouldn't they be able to at least argue that?

24 MR. SAVERI: Well, first, Your Honor, I think that's
25 backwards. Before they can argue it, there has to be evidence

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1 of it. And the evidence --

2 THE COURT: Well, I'm assuming -- I'm not going to go
3 back through in the record to check right now. I'm assuming
4 that what Mr. Johnson has represented is essentially accurate in
5 terms of their argument of what those facts allow for in terms
6 of a reasonable inference. Let's start there.

7 Is your argument that if what he is presenting or
8 proffering is true, he still shouldn't be relevant because it's
9 outside of the relevant market? Is that your argument?

10 MR. SAVERI: Well, Your Honor, there was a lot that
11 Mr. Johnson described what this evidence is which is not in fact
12 what the evidence is.

13 THE COURT: Okay. Well, but, Mr. Saveri, I want you to
14 get past that part.

15 MR. SAVERI: Okay.

16 THE COURT: I'm looking at this particular issue, which
17 is can the defendant present evidence that these fighters could
18 readily fight for another entity, even if it's outside of the
19 United States, and make equal or better compensation? Can they
20 present evidence of that?

21 MR. SAVERI: If -- if they have evidence of that, which
22 is -- well, first, Your Honor, we say it's beyond the scope of
23 the relevant market. We don't think that evidence is admissible
24 or relevant, and I think it's confusing to the jury for the
25 reasons that you talked about a minute ago.

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1 So we -- we wouldn't concede that it is admissible.
2 The evidence here that we're talking about, which is entirely
3 speculative -- and maybe what we should do is have a proffer
4 about what that evidence is before we can make this decision,
5 but the -- but the fact that one of our plaintiffs tried to be a
6 fight promoter, not a fighter, the promotion never got off the
7 ground --

8 THE COURT: Well, why are you even objecting to this?
9 I mean, you could make this -- I'm not even sure why you
10 wouldn't, Mr. Saveri, say, "You know what, this just proves our
11 case. Even when they went to South America, they still couldn't
12 start an MMA promotion."

13 MR. SAVERI: But, Your Honor, this is the 403 issue,
14 really, is that there is a point at which evidence has a
15 potential and the likelihood of confusing the jury. And rather
16 than putting it on and having to argue and say why it doesn't
17 apply, I mean, that's what 403 says. And so we say, on balance,
18 this evidence is not probative and it's prone to confuse the
19 jury, especially about these technical issues that have to do
20 with relevant market.

21 And if you're going on --

22 THE COURT: Well, let me ask you this question because
23 I'll have to go back and look, and I want to make sure I'm going
24 back myself and looking at the law on this as relates to the
25 burden of establishing the relevant geographic market.

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1 MR. SAVERI: That's fair, Your Honor.

2 THE COURT: Because I actually think the plaintiffs
3 have to support that. The question is at what point does the
4 evidence of a market that's fairly far afield become more
5 confusing than probative for the jury, which is what you're
6 saying.

7 MR. SAVERI: Yes, Your Honor.

8 THE COURT: Is there a point at which -- even though
9 they're able to present this technically, it's very confusing.
10 What I'm going to do rather than have us go back and forth is
11 I'm going to go back and look at the burden because I do think
12 the plaintiffs have a burden of establishing this aspect of
13 their case.

14 MR. SAVERI: And we don't dispute we have the burden.

15 THE COURT: But the question is at what point even in
16 the context of establishing that can evidence be irrelevant in
17 terms of the geographic market that is being argued.

18 MR. SAVERI: And --

19 THE COURT: But again, Mr. Saveri, I have to tell you,
20 I'm not even sure that I -- other than confusion, I don't really
21 see the prejudice. I mean, if that's what they want to argue
22 and you want to argue the opposite, you can certainly argue
23 that. It's not as if you wouldn't be able to make arguments
24 about why this particular evidence demonstrated what you are
25 arguing.

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1 MR. SAVERI: That's absolutely true, Your Honor, but we
2 are going to be here in the United States talking about a market
3 that was defined as the United States. And we think to the
4 extent we're talking about Uruguay or Argentina and a promotion
5 that never got off the ground, it has the potential and the
6 likelihood under 403 to confuse the jury. But I take your
7 point.

8 THE COURT: Well, here's what we'll do. I am going
9 to -- at this point in time I think there's reason enough to
10 allow it, but I'll hear further proffer on the 28th about that.
11 I think that that's fair game in this case.

12 All right. Let's move on. Let's see. Did we address
13 this issue with the identity class or not? I thought we've
14 already done this. This is Number 12 and 999.

15 MR. YATES: I think we did, Your Honor.

16 THE COURT: Okay. So Number 13, evidence of economic
17 benefits or charity by Zuffa to the Las Vegas area.

18 MS. PHILLIPS: Thank you, Your Honor.

19 THE COURT: So, Ms. Phillips, are you going to be
20 offering this evidence?

21 MS. PHILLIPS: Yes.

22 THE COURT: Okay. And tell me why it's relevant.

23 MS. PHILLIPS: Sure.

24 So the argument from the plaintiffs is that Zuffa
25 should have paid fighters more money, right. So we believe we

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1 should have the opportunity to introduce evidence of all the
2 other costs that Zuffa has, right. We have to pay other
3 professionals who helped to run Zuffa. We have to pay marketing
4 costs. We have to pay promotional costs. Charitable giving is
5 among those expenses.

6 They can certainly argue, "Well, that's not a required
7 expense," but we believe we are entitled to say, "These are all
8 of the other costs that we have, and if we had to pay fighters
9 more, that would come" -- right, something else has to give.
10 And they can certainly cross -- you know, cross our witnesses --

11 THE COURT: So are they going to say, "In order for us
12 to have given the fighters more, we would have had to have
13 donated less to Las Vegas"? Because, certainly, I'm not going
14 to let them say that. I mean, that, Ms. Phillips, would be
15 directly prejudicial.

16 And so if the issue is this is a line item in our costs
17 and we have to pull the money from somewhere --

18 MS. PHILLIPS: Exactly.

19 THE COURT: -- that's fine. But I just want to be
20 clear. They're not going to be able to get up there and say,
21 "Well, you know, in order to pay the fighters more, we would
22 have had to contribute less, right, to the March of Dimes or the
23 Boys Club," right. That seems to me to be unfairly prejudicial.
24 But if you're saying this is just a line item, that was one of
25 the line items, I don't know that I see any issue with that.

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1 Let me hear from the plaintiffs on that particular portion.

2 MR. CRAMER: Your Honor, Eric Cramer for the
3 plaintiffs.

4 We believe it would be entirely prejudicial for them to
5 point to a charitable line item and say, "Yeah, it was this
6 particular charity to Las Vegas and to you, jurors, that's where
7 the money would have come from" --

8 THE COURT: Okay. So, Mr. Cramer, if I'm understanding
9 this, what you're saying is they can point to charitable
10 donations. They can't identify entities. Is that your concern?

11 MR. CRAMER: The concern is that there's just no --
12 first of all, there's no evidence or no reason to believe that
13 if Zuffa had to pay its fighters more, that they would give less
14 charity. They obviously give --

15 THE COURT: Mr. Cramer, I'm not going to let them say
16 that. The issue is if that's one of the line items in their
17 budget, they should be allowed to say that. They don't have to
18 identify the entity. But why can't they say that? If that's
19 actually one of their expenditures, why can't they include that?

20 MR. CRAMER: Well, it would be highly prejudicial for a
21 Las Vegas company to talk about the charitable giving that they
22 give. And the implication is -- the implication that we just
23 heard is that if they had to pay the fighters more, they would
24 give Las Vegas less. That's the implication they want the jury
25 to get, which is completely unfair and prejudicial.

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1 And the fact that they give charity -- there's just no
2 reason to believe that if they had to pay their fighters a
3 competitive wage instead of paying themselves billions of
4 dollars, that they would have given less in charity. There's
5 just no reason to believe it. And they're trying to imply that
6 to the jury, and that would be highly prejudicial.

7 THE COURT: Okay. Well, I guess I want to hear from
8 the defendants again about what and how this would be presented.
9 Because again, Mr. Cramer, if it's in a spreadsheet where there
10 is a list -- an item, again, I haven't seen the particular
11 exhibit again, that says this is part of what we spent money on,
12 I don't know that they should be prevented from including that
13 in a document that already exists.

14 I take your point about identifying local entities and
15 even identifying whether or not it's local or not, right. You
16 know, we can talk about that, but I guess let me hear from the
17 defendants about, sort of, what and how they'd present it
18 because it seems to me a lot of this is about the presentation.

19 So, Ms. Phillips, let me first ask the question. How
20 much are we talking about as relates to a percentage of the
21 overall expenditure? Do you know?

22 MS. PHILLIPS: I don't know.

23 THE COURT: Okay. Because that's relevant to me, too.
24 If this is like half of a percentage, then that seems to me to
25 be prejudicial.

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1 MS. PHILLIPS: I can certainly bring that information
2 on the 28th, Your Honor.

3 THE COURT: Right. I think it would be helpful to know
4 two things on the 28th, what is the actual percentage we're
5 talking about. Are you trying to present actual entities?
6 Because I am going to tell you now, I won't let that happen.
7 And I'm not even sure that I would allow any geographic location
8 to be identified, but it would be helpful to know where this
9 information is identified.

10 MS. PHILLIPS: Sure.

11 THE COURT: And are you going to have witnesses testify
12 about it? Because I absolutely would not let witnesses say, "We
13 would give less to Las Vegas if we paid the fighters more."

14 MS. PHILLIPS: Understood.

15 THE COURT: But I'm not saying that you would say that,
16 but I want to be clear about that. But I want to see how this
17 would be presented. I want you to think about how it might come
18 in through witnesses. Because I definitely think there is a
19 significant potential for prejudice, but I also think the
20 defendants should be able to identify a line item, right. And I
21 want to see how that would be presented.

22 MS. PHILLIPS: Sure. I mean, if I can make one other
23 point, Your Honor, too. The plaintiffs -- and you've seen this
24 before, but the plaintiffs are going to come in and argue, you
25 know, "Zuffa spent money on other things instead of the

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1 fighters." So, for example, aviation costs is something
2 that's -- you know, we're going to hear about that at trial and
3 we're going to dispute that. And then they'll -- you know,
4 they'll do whatever they're going to do.

5 THE COURT: The difference, though, Ms. Phillips, is
6 the jurors might be directly implicated in terms of their own
7 experiences with the donations here locally. The executives at
8 Zuffa, to the extent that these things may or may not have
9 happened, right, it's a very different circumstance than
10 potentially impacting jurors who may or may not be affected
11 directly without us knowing about it by their contributions to
12 local charities in which the jurors may or may not be involved
13 or receive benefits. And so I think those things are very, very
14 different.

15 MS. PHILLIPS: Well, I understand your point on, you
16 know, identifying specific Las Vegas-based charities. But, you
17 know, it does seem that we ought to be able to say, right, if
18 there is a criticism about how we spent corporate money, we
19 ought to be able to demonstrate to the jury how we spent it.
20 And we can say charitable donations and not be specific about
21 which charitable donations or even identifying, you know, that
22 they benefitted Las Vegas specifically as opposed to national
23 charitable organizations. That seems like something that we
24 ought to be able to introduce evidence of to demonstrate that
25 when we were spending money we weren't overspending money on --

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1 on, you know, wasteful things.

2 THE COURT: Okay. Well, again, I want to hear a little
3 bit more about that when we come back on the 28th.

4 MS. PHILLIPS: Understood. Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 Let's see. So I'm not sure who's going to be arguing
7 Number 14, which is in Document 1000, as it relates to excluding
8 speculation by lay witnesses regarding the financial condition
9 of promoters Zuffa acquired between 2006 and 2011.

10 MS. PHILLIPS: May I?

11 THE COURT: Well, let me first hear from them,
12 Ms. Phillips, about what it is specifically that they anticipate
13 is going to be offered.

14 (Defense counsel conferring.)

15 THE COURT: So who's going to be doing this for the
16 plaintiffs?

17 MR. DELL'ANGELO: I will, Your Honor. Michael
18 Dell'Angelo.

19 THE COURT: Okay. Come on up, please, Mr. Dell'Angelo.

20 So, Mr. Dell'Angelo, tell me exactly what it is that
21 we're worried about being said.

22 MR. DELL'ANGELO: The concern, Your Honor, is that the
23 lay witnesses and Dr. Topel in particular as an expert witness
24 would offer unsubstantiated opinions about the financial
25 condition of competitors, you know, identifying them or

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1 characterizing them as failing or going out of business or
2 losing money, where that testimony is based on speculation or
3 hearsay.

4 THE COURT: Okay. Are there specific aspects? Because
5 when I looked at your -- and I'm looking back through the
6 motion. It's not clear to me exactly what you expect he's going
7 to say, right. I mean, can he not say it's not clear that a
8 particular competitor had the financial resources or was
9 successful, I mean, or are you saying that he has no basis for
10 saying that? I mean, there's -- I have to go back and look and
11 see what information the experts received about the competitors
12 because they did receive some.

13 So I guess I can't tell from what's been argued here
14 what are the specific types of statements, other than what you
15 just described, you're going to be worried about and which
16 businesses he's going to be saying that about.

17 MR. DELL'ANGELO: Sure. So if your question to begin,
18 Your Honor, is focussed on Dr. Topel, we do address this. This
19 is at ECF 1000, Page 5 of the Document 7 of the ECF Document.
20 And the issue that we identify there in the second full
21 paragraph is that what Dr. Topel is relying on is the type of
22 evidence that an expert would not normally rely on which is, for
23 example, unsubstantiated hearsay. And there are a few examples
24 of that in the motion itself from the lay witnesses.

25 And, you know, one example at the top of the same page

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1 that I just identified was during the deposition of Mr. Epstein
2 where he says, quote, The business was failing because they
3 couldn't manage it properly, I assume. Right. The issue is
4 that -- and it -- you know, Mr. White likewise. There's some --
5 at Exhibit N to the declaration that supports this motion --

6 THE COURT: So is the concern here, Mr. Dell'Angelo,
7 that what he's going to say is that the reason why these
8 competitors were not successful has nothing to do with entry
9 barriers or the availability of fighters, but their own
10 mismanagement. Is that what your concern is?

11 MR. DELL'ANGELO: Their own mismanagement or that they
12 were losing money or that they were, quote, failing, precisely.
13 But where that testimony for Dr. Topel is based on, again, the
14 type of evidence that an expert wouldn't normally rely on such
15 as unsubstantiated hearsay, and also with respect to the lay
16 witnesses where even if there is the, sort of, appearance of
17 personal knowledge, the personal knowledge isn't really there.

18 And we provided you for an example an instance where
19 Mr. White testifies about a competitor that they -- that the UFC
20 acquired by the name of Pride, right. And his testimony was,
21 you know, one of the issues or reasons that they were failing is
22 because Pride was really run by Yakuza, which is the equivalent
23 of the Japanese mafia. "How do you know that?" "I read it in
24 the newspaper," right. That's not personal knowledge, and
25 that's the problem.

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1 But if you have these witnesses in a case where
2 acquiring and shutting down promoters, the rival promoters, and
3 taking their fighters into the UFC, the testimony is not truly
4 personal knowledge, right, or 701-type information, but rather,
5 "Oh, I read it in the newspaper." And I will tell you, you
6 know, if you look at the very last paragraph of our MIL on this
7 issue, there's plenty of evidence that was produced in the case
8 that suggests just the opposite, right, that these competitors
9 were acquired for reasons that had nothing to do with their
10 financial condition and doesn't substantiate their financial
11 condition.

12 But, really, the central point being is that the
13 evidence that we have doesn't suggest that there is personal
14 knowledge.

15 THE COURT: Well, so part of the issue,
16 Mr. Dell'Angelo, you've identified I think would be different
17 depending upon who says it. And I say that because if Mr. White
18 comes in here and says, "I don't think they were -- we didn't
19 acquire them because they were not particularly successful in
20 our view," he can say that, right. Or, "We acquired them
21 because we thought that they were ripe for the picking because
22 they didn't have any assets from our view," he can say that, I
23 think.

24 I don't know that -- I want to hear more about what
25 Dr. Topel is going to opine about the financial condition of

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1 other alleged competitors.

2 But I think a witness like, for example, Mr. White who
3 was directly involved with the business decisions of Zuffa in
4 terms of acquisitions could certainly explain why they may or
5 may not have acquired particular entities, and he can give his
6 explanation that he thinks is consistent with Zuffa's theory.
7 And whether or not that's relied-upon information that is
8 speculative, that still forms the basis of his decision and that
9 would still be relevant for the jury to hear.

10 But I take your point that's slightly different if
11 Dr. Topel is describing a business as an expert as failing or
12 going out of business. And so I'll hear from the defendant
13 about that, but --

14 MR. DELL'ANGELO: Well, if I may, Your Honor. I agree
15 with you with respect to Dr. Topel, and I think that that's spot
16 on and will likewise be interested to hear what the defendants
17 have to say.

18 But just to put a sharper point on the concern with
19 respect to the lay witnesses is -- and I don't entirely disagree
20 with your -- with your view of what those witnesses can say when
21 they're involved. The concern is even when they're involved, if
22 the actual basis for that information -- for their personal
23 information is speculation or hearsay, that is where it becomes
24 problematic.

25 THE COURT: But what I'm saying to you is if Mr. White

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1 is making decisions, even if it's based upon speculation, those
2 decisions would still be relevant and he can describe what he
3 believed. And certainly we can think about an instruction that
4 speaks to whether or not that's actually accurate or not. But
5 if that formed the basis for him making a particular decision or
6 recommending a particular course of action, I think that would
7 be something the jurors could hear.

8 But let me hear a little bit more from the defendants,
9 and then I may have more questions.

10 So, Mr. Isaacson, I guess the specific point is, is
11 Dr. Topel going to offer as an expert an evaluation of
12 competitors as being failing or mismanaging based upon
13 statements from other people?

14 MR. ISAACSON: There will be a combination of evidence
15 on that, including evidence that will have to be put in with the
16 foundation of personal knowledge. Other than, as you point out,
17 you can -- you can -- you can have an opinion about why you did
18 something and not have it be terribly factually based. But we
19 are going to put in witnesses -- because we acquired these
20 companies and got their finances. And they can testify about
21 the financial state for personal knowledge of those companies.
22 Dr. Topel based on that, which is what he did in his report, can
23 testify about whether they were failing firms at the time of
24 acquisition.

25 In addition, could I just --

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1 THE COURT: So, Mr. Isaacson --

2 MR. ISAACSON: There's also -- can I --

3 THE COURT: Hold on just a second. I just want to make
4 sure I'm understanding what you're saying. So you're saying, to
5 the extent that he offers an evaluation of it, it would be based
6 upon from your perspective witnesses who had personal knowledge
7 that was from the entities, and it's not him, for example,
8 making a decision about a business failing because in this one
9 instance of this, quote, The rival is done or the person's out
10 of business, he's not drawing that simply on such a statement.

11 MR. ISAACSON: That is correct, Your Honor.

12 THE COURT: Okay.

13 MR. ISAACSON: And Your Honor raised the issue of,
14 like, the decision of why to acquire. There's also a decision
15 that plaintiffs put into issue as to why to shut down these
16 firms as independent trademarks such as Pride and just have the
17 fighters fight for the UFC.

18 THE COURT: Right.

19 MR. ISAACSON: And so the -- a news report about the
20 Yakuza being involved in one of them doesn't get admitted for
21 the truth, but it affects a decision as to why to shut something
22 down. And it goes into the input of the decision. It would
23 not -- that -- no one's going to know and be able to say that
24 that was true or not.

25 THE COURT: Right.

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1 MR. ISAACSON: Okay. But there were consequences that
2 came from those press reports that went into the decisions that
3 were made. But these are things that you're going to be able to
4 look at as the evidence comes in at trial.

5 THE COURT: Okay.

6 Well, I think what I'm going to need some help with
7 then from the plaintiffs is more specific examples,
8 Mr. Dell'Angelo, of exactly what you anticipate would be the
9 problem, right. Because I do think an expert can rely upon
10 information they receive from what they believe to be a person
11 with personal knowledge. And so there's going to be I think a
12 continuum of the degree of personal knowledge, the amount of
13 information that's available, and I think you'll have to let me
14 know where you think the line should be.

15 Mr. Isaacson has indicated that there are entities that
16 were acquired where their information was produced and
17 individuals related to the operation of the respective entities
18 provided testimony and will testify. That from my standpoint
19 would be perfectly acceptable. Are you taking issue with that?

20 MR. DELL'ANGELO: To a point, Your Honor. I think
21 where the complication comes in is that to the extent that
22 Dr. Topel characterized one or more of these rival promotions
23 who were acquired by Zuffa and shut down as failing, that
24 characterization was based on the type of speculative --

25 THE COURT: No, but what I'm saying is if he received

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1 that information from an individual who was involved in the
2 operations of the business, why wouldn't that be appropriate for
3 him to rely upon?

4 MR. DELL'ANGELO: Well, because the information that an
5 expert would ordinarily rely on is not actually in the report.
6 So what I think Mr. Isaacson in effect said is that the analysis
7 that Dr. Topel should have done in his report will be
8 constructed on the fly in front of the jury, right, during the
9 trial.

10 THE COURT: I doubt very seriously that that's how
11 Mr. Isaacson would characterize what he just said.

12 MR. DELL'ANGELO: No, I am sure he would not, but what
13 he said -- what he did say was that at trial, right, we'll
14 put on witnesses with personal knowledge who will testify to the
15 financial condition, who will rely on the documents. Those are
16 all the things that Dr. Topel did not do.

17 THE COURT: So, Mr. Dell'Angelo, why can't you -- that
18 is, like, the subject of cross. You could have a hardy and
19 robust cross-examination --

20 MR. DELL'ANGELO: Sure.

21 THE COURT: -- about you didn't know anything -- I
22 mean, you know.

23 MR. DELL'ANGELO: It's also the subject of the order of
24 operations, which is that the cross follows the expert report.
25 The expert report doesn't include the information that

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1 Mr. Isaacson is saying they essentially now intend to develop at
2 trial.

3 THE COURT: Well, that's true, but, you know, that's
4 the beauty of going second, right, and having the cross, right?
5 Or, you know, going second like, you know, the Kansas City
6 Chiefs found out the beauty of going second is sometimes you
7 actually win, right.

8 So what I will say to you is this. Right now I'd have
9 to see this. Right now I don't see a basis to, sort of, engage
10 or to issue a wholesale order that would require Dr. Topel not
11 to testify about this. If you have a specific determination
12 about a particular business failing or that no information was
13 provided, you can bring that to my attention. But for now I'm
14 going to deny that motion. Thank you.

15 MR. DELL'ANGELO: Thank you, Your Honor.

16 THE COURT: Okay. Now, here's this one about the
17 business school case study. Who's going to be arguing that for
18 the defendant?

19 Mr. Chiu.

20 MR. CHIU: Yes, Your Honor.

21 THE COURT: So what aspect of this being a business
22 school case study are we focussed on?

23 MR. CHIU: So I think the issue with this document and
24 this topic is that, you know, Mr. Fertitta was actually
25 consulted and, you know, given the opportunity to kind of

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1 comment on this case study as part of Harvard Business School.
2 I think it goes directly to the, you know, issues at the heart
3 of this case, which is, you know, the founders of Zuffa where
4 they through business acumen building this business and the fact
5 that, you know, part of this --

6 THE COURT: Isn't that what the jury's supposed to
7 decide, Mr. Chiu? And it's great, I mean, that the Harvard
8 Business School potentially decided to use the case study. But
9 wouldn't that be something that they should decide? I mean,
10 Mr. Fertitta or whomever I assume is going to tell the jury the
11 same thing that he told them, right, or that would be the same
12 basis for that. So I'm not sure why it would be relevant that
13 it was a case study when the jurors are going to have that same
14 information to be able to make that same decision.

15 MR. CHIU: It is relevant, and I don't think we would
16 admit the case study itself, right, for proof of that fact. But
17 the fact that, you know, Zuffa's executives and their -- you
18 know, their being contacted and giving input on this case study
19 is relevant.

20 And if the plaintiffs are going to, you know, challenge
21 our executives and question them about kind of their motivations
22 and building this business in a legitimate versus an
23 illegitimate way, this is fairly within the ambit of what is
24 relevant and that they should be able to elicit on -- testimony
25 about.

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1 THE COURT: Okay. Thank you.

2 Ms. Noteware, you don't need to argue this to me. I
3 don't find this to be relevant myself, and so I'm not going to
4 allow for the testimony on this. Certainly, the executives at
5 Zuffa can talk about their own -- what they believe to be their
6 own special acumen, but I don't think being identified as a
7 business school case study is relevant and I think it would be
8 confusing to the jury. So I'll grant the motion as relates to
9 that.

10 Now, for 1000 we've already talked about video clips.
11 So I'm not going to do that again.

12 And I think there's another motion here about, moving
13 on, excluding reference to the effect on this case -- excuse
14 me -- to the effect of the verdict in this case on the Las Vegas
15 community. I'm not sure that the defendants said they're going
16 to offer anything like that. Is anyone going to be offering
17 anything like that?

18 MS. PHILLIPS: No, Your Honor.

19 THE COURT: Okay. I didn't think so. So I guess I'll
20 just deny that without prejudice as being moot.

21 And then there's a motion to exclude evidence
22 concerning evidence, conduct, or facts where Zuffa objected to
23 and did not produce discovery. I'm not really sure what the
24 plaintiffs are getting at here. So maybe someone can help me
25 understand that.

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1 MR. MADDEN: Thank you, Your Honor.

2 At the beginning of this case we served requests for
3 production of documents, and immediately after that we had a
4 meet and confer on Zuffa's preservation obligations. Our
5 request for production of documents asked for material going
6 back to July 1st, 2000, which I believe predates the acquisition
7 of the UFC by Zuffa.

8 They objected to preserving documents going back that
9 far. They objected to producing documents going that far. They
10 weren't even really going to search for them, but in the process
11 of our meet and confer they found a bunch of boxes of documents
12 that date back prior to 2005. And we wanted them to review them
13 and produce them to the extent they were responsive and relevant
14 to the case.

15 They objected to doing that. Ultimately we had meet
16 and confers. We fought over it. And Magistrate Judge Leen set
17 the relevant time period based on Zuffa's objections and our
18 meet and confer at January 1st, 2005. Documents that they
19 collected, but did not look at remain unreviewed and unproduced
20 in this case concerning that pre-2005 period.

21 And what they did agree to produce that goes back
22 before then and that has been the subject of discovery and that
23 we don't object to including at trial are things like the
24 financials, right. Guy Davis goes through the history of
25 Zuffa's financials going all the way back. Fighter contracts,

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1 we have fighter contracts that go all the way back, and
2 Dr. Singer analyzed them.

3 But outside of that material, we believe that anything
4 that concerns facts and circumstances prior to January 1st of
5 2005 should be excluded from the trial because they didn't
6 participate in discovery on it.

7 THE COURT: I'm not sure I understand what it is you
8 anticipate they're going to be offering.

9 MR. MADDEN: Sure. Well, one, we know that they are
10 going to put at issue their building the UFC from whatever it
11 was when they acquired it seven years or eight years after it
12 started until our relevant time period. And what we would say
13 is you can introduce what you did after 2005, other than the
14 money that you put in because that's in the financials, but you
15 can't talk about all of the work that you did that made it
16 whatever it is at that point in time.

17 THE COURT: Well, if I'm going to let you all talk
18 about the history of how they became an alleged monopsony, how
19 do I not let them talk about how they built up the business and
20 based upon their business acumen?

21 MR. MADDEN: Well, I would start with the fact that
22 they can talk about it as of the time that they started
23 discovery on it, which is 2005, which predates the scheme.

24 THE COURT: Mr. Madden, I don't agree with that. I
25 mean, if there's specific documents that you have a concern

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1 about, then you should bring that to my attention. I will let
2 both sides talk about how UFC was founded and its development.
3 They are perfectly entitled to have their witnesses talk about
4 how they built this business up from nothing based upon their
5 business acumen. That is their entire theory in addition to it
6 not being anticompetitive.

7 So I don't -- I don't find this, sort of, artificial
8 2005 deadline to be relevant in the context of that type of
9 testimony. If there are specific documents that you feel like
10 somehow you were prevented from being able to review or exploit
11 because of their objections, then you can raise that with me.
12 But other than that, they will absolutely, their witnesses, be
13 able to talk about pre 2005 what they did to build up their
14 business.

15 MR. MADDEN: I just want to say, I think the issue is
16 that I can't identify specific documents to you because they
17 remain unreviewed, likely destroyed, in boxes that they were
18 told they didn't have to produce in this case. So it's hard for
19 me to --

20 THE COURT: Well, if your concern is they're
21 referencing a document that they should have kept, that's
22 different. So if someone comes up and says, "Well, if you look
23 at our 2002 documents, which weren't produced, you would see
24 this," then you can come to me and say, "Let's have this
25 particular instruction about that."

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1 But my concern is this motion in particular would
2 essentially prevent them from talking at all about how they
3 built up their business and what they did and how they invested
4 in it. If you think that there's information in the form of
5 testimony or documents that's going to come in that is based
6 upon information that was not produced, but should have been
7 produced and/or to which you feel like they have some unfair
8 access, let me know when it comes in and I'm happy to rule on it
9 at the time.

10 I just want to be clear both sides will be able to talk
11 about the history of the UFC, how it was founded, and how it
12 developed from its inception. Okay?

13 MR. MADDEN: Thank you, Your Honor.

14 THE COURT: All right.

15 All right. I don't know if the defendants want to
16 comment on that anymore.

17 MS. PHILLIPS: No thank you, Your Honor.

18 THE COURT: Okay.

19 So preclude evidence -- this is Number 19, preclude
20 evidence or reference to regulatory investigations or inaction.

21 So, Mr. Chiu, exactly how would this evidence be
22 presented?

23 MR. CHIU: Well, I think the evidence would come in --
24 well, first, there's a hearsay exception for closure letters
25 that's been recognized in the law. And that's really what

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1 they're focussed on is closure letters from the FTC relating
2 to --

3 THE COURT: How is this relevant and how is this not
4 confusing? I mean, the jury has to decide this issue as relates
5 to the issue of monopsony. I don't -- I'm not sure how this is
6 relevant.

7 MR. CHIU: It is directly relevant because both the
8 conduct that was investigated by the FTC into the contracting
9 practices and also separately the Strikeforce acquisition are
10 part of the alleged scheme here.

11 THE COURT: Yes, but they're not dispositive to what
12 the jury is going to decide. How is the jury not going to be
13 confused into believing, "Well, if FTC decided this, then that's
14 something we should defer to"? That's exactly the issue here,
15 right. You're aware of that --

16 MR. CHIU: The theory --

17 THE COURT: Hold on. How do I stop that from being the
18 case?

19 MR. CHIU: Well, the theory of their case and I imagine
20 what's going to be in the plaintiffs' proposed instruction is
21 that they're alleging something broader than that. It's an
22 anticompetitive scheme that has these components. And it is
23 relevant to the jury's determination of whether --

24 THE COURT: Mr. Chiu, you're not answering my question.
25 The question is confusion for the jury where they believe that

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1 the issue will be decided because the FTC issued a closure
2 letter, right. How do I address that potential issue of
3 confusion and prejudice?

4 MR. CHIU: By an instruction that says what the
5 plaintiffs are alleging is an overarching scheme that has these
6 components that they say together amounted to an unlawful
7 exercise of monopsony power. We're entitled to kind of test
8 that theory and demonstrate -- you know, introduce evidence that
9 actually a lot of those components the FTC investigated and
10 passed on. It's central to this issue.

11 And the one other thing I -- you know, I asked about
12 Your Honor is that we haven't had a chance to respond in
13 briefing on this. And there is case law in this district
14 finding that a closure letter by the FTC is not only admissible
15 under the public records hearsay exception, but also on this
16 issue of prejudice and kind of disentangling this. So -- and I
17 can give you the case. We obviously haven't had an opportunity
18 to --

19 THE COURT: You can give me the case, and you can bring
20 it to me on the 28th. I will tell you, I'm not inclined to
21 allow this type of evidence in because I think it's very
22 confusing to the jury. But, again, the door can be opened on
23 some of this. I think that's the other issue. A lot of these
24 decisions, I'm telling you now, witnesses get on the stand and
25 they say things. And then the door can be opened to different

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1 aspects of testimony.

2 But, for now, I don't see that this is relevant. I
3 think it's going to be confusing, but I'll allow you to take
4 another shot at it on the 28th.

5 MR. CHIU: Thank you, Your Honor.

6 THE COURT: Okay. This is -- Mr. Saveri, I'm not sure
7 why you're standing up.

8 MR. SAVERI: Because I wanted to convince you that even
9 on the 29th -- 28th, it's going to be highly prejudicial.

10 THE COURT: Well, then you can convince me on the 28th,
11 I would say.

12 MR. SAVERI: Hold that thought, Your Honor. I'll be
13 back. Okay.

14 THE COURT: I'm sure you'll all be back.

15 MR. SAVERI: All right. Thank you.

16 THE COURT: So the last motion we have is excluding
17 reference to purported past relationships between class counsel
18 and their expert witnesses. So who's going to be arguing this
19 for the plaintiffs?

20 MR. SAVERI: I am, Your Honor.

21 THE COURT: Okay. So, Mr. Saveri, is your concern that
22 they're going to get up here and say, "Dr. Singer, how many
23 times have you been an expert for our firm?"

24 MR. SAVERI: Yes, and --

25 THE COURT: And why can't they say that?

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1 MR. SAVERI: Because --

2 THE COURT: I mean, just like why can't they talk
3 about, like, the cost? I mean, why can't they talk about that
4 in terms of bias?

5 MR. SAVERI: Well, they -- bias, well, they can
6 certainly ask Dr. Singer the kind of questions they can
7 cross-examine a witness on ordinarily. Like, what cases you've
8 testified in --

9 THE COURT: Mr. Saveri, you're not answering my
10 question. Why can't they ask that specific question of: How
11 many times have you testified for plaintiffs? How many times
12 have you testified or have you been hired by plaintiffs'
13 counsel? That seems to me perfectly legitimate, like, bias
14 testimony.

15 MR. SAVERI: So, Your Honor, we -- those questions that
16 you just asked we do not disagree with. The question that we
17 disagree with which we think would be prejudicial would be:
18 Mr. Singer, how many times has Mr. Saveri hired you? Do you
19 have a business relationship with Mr. Saveri? Do you have a
20 business relationship with Mr. Cramer? Do you have a business
21 relationship with Mr. Brown? That's -- that's not --

22 THE COURT: Well, first of all, if they did have a
23 business relationship, why wouldn't that not be -- I mean, I
24 don't know why that also wouldn't be relevant bias --

25 MR. SAVERI: But, Your Honor, it's different if we've

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1 hired him in other cases. The implication of it is that
2 he's --

3 THE COURT: He's a hired gun. Absolutely. That's what
4 they're going to say. That's what you're going to say. I'm not
5 sure, Mr. Saveri -- like, these are standard things that come up
6 in these types of case. So I'm confused by this because you'll
7 get to ask the same questions of their witnesses, right. That
8 happens all the time with experts. So I'm not sure what the
9 particular dangers you're worried about.

10 MR. SAVERI: Well, Your Honor, it's about the fact that
11 there is a -- some kind of personal relationship between the
12 experts and plaintiffs' counsel such that it would undercut
13 their testimony. I've been in lots of cases where the
14 distinction that I'm drawing has been recognized by the Court.
15 And you can certainly ask an expert: How many -- do you always
16 testify as a plaintiff?

17 THE COURT: Mr. Saveri, if in fact there was a personal
18 business relationship between plaintiffs' counsel where they
19 were involved in a business, that absolutely would be relevant.
20 So I really am not understanding what your concern is because
21 all the questions that you have said they shouldn't be able to
22 ask I think they can ask. So I'm going to give you one more
23 chance. Give me a question that you think they should not be
24 able to ask that you anticipate they might ask.

25 MR. SAVERI: Mr. Singer ... Mr. Singer, how many cases

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1 have you been hired by Mr. Saveri to work in a plaintiffs'
2 antitrust case? Those -- those questions in other cases have
3 been forbidden. They're certainly entitled to ask him if
4 he's -- how much he gets paid, how much he got paid in this
5 case, does he tend to do plaintiff's work.

6 THE COURT: Oh, okay. I'm not sure that I agree with
7 you on that. I don't know why that would be unfair or
8 prejudicial in this context. I don't think it would be helpful
9 for them to go down the table and ask about each lawyer there,
10 but I think if the issue is about firms and which firms that are
11 representing the plaintiffs have been previously hired by
12 Dr. Singer, they can ask that. If it's about the number of
13 times they've been hired, they can ask that. I'm not going to
14 preclude them from asking that so --

15 MR. SAVERI: It's the personal -- it's the
16 personalization of the questions which I think would be unfair
17 and --

18 THE COURT: So if you want to say -- you want them to
19 be required to say, you know, how many times has the particular
20 firm hired you, again, I'm not sure I understand the real
21 difference as it relates to that. I'll think about that. But
22 as it relates to the question to ask Dr. Singer, how many times
23 he's been hired by plaintiffs' counsel --

24 MR. SAVERI: He's certainly entitled to ask that
25 question.

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1 THE COURT: So right now I don't see anything that I'm
2 excluding, but we'll see when they ask the questions.

3 MR. SAVERI: Your Honor, if I may. I think there were
4 two in limine motions that we didn't talk about.

5 THE COURT: Okay. What are those?

6 MR. SAVERI: I don't have the docket numbers, but I
7 think one was to exclude the evidence of reference that
8 plaintiffs allegedly failed PED tests.

9 THE COURT: Oh.

10 MR. SAVERI: And then there's another one I think it
11 was immediately subsequent to that which was -- no, we dealt
12 with the PED tests. It's the -- no, the next one, evidence of
13 reference -- no, we dealt with that one, too. I'm sorry.

14 Maybe --

15 THE COURT: So we didn't deal with the one --

16 MR. SAVERI: So my notes were wrong. I don't think
17 we've done the PED one, Your Honor. I think we did the
18 following one.

19 THE COURT: Right.

20 MR. SAVERI: But it's been a long day. I may have --
21 my recollection may be fading.

22 THE COURT: No, we didn't deal with that one. Yes,
23 that was Number -- that's Number 9. I skipped over that.

24 So that's Document Number 999.

25 MR. SAVERI: And I'm going to argue that when you're

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1 ready for the plaintiffs.

2 THE COURT: Okay. Well, let's hear from the defendants
3 first. I want to figure out what it is they want to offer and
4 why this is relevant.

5 So, Ms. Phillips, the relevance here?

6 MS. PHILLIPS: Sure.

7 So this is specific to named plaintiff, Jon Fitch. In
8 2014 he was fighting for the World Series of -- World Series of
9 Fighters? WSOF? I got that right. Thank you. And he tested
10 positive for PEDs, and he was suspended for nine months. We
11 think this is directly relevant because of course he left UFC.
12 He went to a competitor fighter. And to the extent he gets up
13 and says, "Well, I was paid less. I didn't make enough money at
14 WSOF," we should be able to -- you know, we should be able to
15 cross-examine him and say, "Well, the reason was because you
16 took illegal drugs and you were suspended by WSOF. So of course
17 they didn't increase your pay and give you more." That's the
18 argument, Your Honor.

19 THE COURT: Okay. Let me again look at the timing of
20 this. Okay.

21 Mr. Saveri, do you want to respond to or is that --
22 oop. No. Mr. Young.

23 MR. YOUNG: Hello, Your Honor.

24 So we would contend that this -- the evidence of
25 Plaintiff Fitch's allegedly failed PED test, which occurred

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1 after his career at the UFC, is not only irrelevant, but highly
2 prejudicial. And we would point you to the case cited in our
3 MIL, this *Miljas* case which dealt with a professional boxer.

4 THE COURT: Hold on again, Mr. Young. I'm pulling this
5 up again. I want to make sure that I have the correct date as
6 to when he failed this test.

7 MS. PHILLIPS: Your Honor, I don't believe the date is
8 in their motion in limine, but it is 2014.

9 THE COURT: Okay.

10 So, Mr. Young, is Mr. Fitch going to get up and say, "I
11 was paid less?" And because if he gets up and says that, why
12 wouldn't they be able to do exactly as Ms. Phillips indicates?

13 MR. YOUNG: Because even if it were relevant, it's
14 still highly prejudicial for the reasons as explained in the
15 cases we cite.

16 THE COURT: Well, it has to be unfairly prejudicial.
17 If he's making a blanket statement that says, "I was making less
18 money" and there's a reason why he's making less money, why are
19 they not entitled to bring that up?

20 Now, it's one thing if he talks about the terms of the
21 contract. So if he wants to be able to say, "The terms of my
22 contract were this and these terms are better than the other
23 terms," fine. Then he doesn't necessarily seem to open the door
24 to that. But I will tell you if he gets on the stand and says,
25 "I was paid less or I was compensated less when I left," right,

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1 or, "I was paid less by the UFC and paid more by the rival
2 promoter," and he says it in those, sort of, generic terms, I'm
3 going to let them ask him about it.

4 So the thing to do here I think, Mr. Young, because I
5 don't want to go back and forth with these, is prepare your
6 witness, right, as it relates to the testimony. If he's just
7 talking about the contract terms, I don't know that he opens the
8 door to that. If he's talking about compensation generally and
9 what people should or shouldn't be paid or what he was
10 individually paid, then his individual employment history,
11 including suspension, would be relevant.

12 MR. YOUNG: I do believe that his compensation at WSOF
13 was determined by contract. It's very similar to what happened
14 at -- with the UFC. So, loud and clear. It sounds like if he
15 opens the door to it, that this is coming in.

16 THE COURT: As with almost all of this, if a witness
17 gets on the stand and opens the door wide, I will let the other
18 side walk right through it. So all of my rulings are contingent
19 for the most part except for a few of them as relates to
20 discovery on that not happening. If it does happen, either side
21 is certainly free to come back to me and say, "They've opened
22 the door so we should be able to present this information."
23 Okay?

24 MR. YOUNG: Understood. Thank you, Your Honor.

25 THE COURT: All right.

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1 Well, okay, I think we've addressed all of these
2 things. I know it's been a long day. It's already after 5
3 here. And so there are a couple of things that I still want us
4 to address very briefly.

5 (Court conferring with courtroom administrator.)

6 THE COURT: So for the questionnaires, the jury
7 questionnaires that we have, what I will tell you is I'm
8 probably going to reduce the questionnaire slightly here, and in
9 going through the record, I don't recall whether or not either
10 side's objections to any questions were noted here. I think
11 this was a joint questionnaire, but, again, I want to go back
12 and look through my notes. I don't think that I have a list of
13 any objections. Do you all have objections? I just want to
14 double-check that.

15 MR. POMERANTZ: Your Honor, again, Crane Pomerantz.

16 THE COURT: Yes. You can come up to the podium,
17 Mr. Pomerantz.

18 MR. POMERANTZ: Crane Pomerantz for the plaintiffs.

19 Just for purposes of the record, Your Honor, that was a
20 joint submission. There was a considerable amount of give and
21 take on both sides.

22 THE COURT: Okay. Perfect. Thank you, Mr. Pomerantz.

23 I may make a few edits to that, but I wanted to
24 double-check that. And the way this will work, they should go
25 out, again, later this week. I will get them back and review

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1 them, and you all will get them before we begin our voir dire.

2 The other thing I will tell you is because I am
3 concerned potentially about the number of jurors who might be
4 excused for different reasons because of their participation or
5 not in various aspects of this business, we will have probably a
6 two-day voir dire process. If we get all of the witnesses [sic]
7 on the first day, then we won't need to bring people back the
8 second day. But we're going to call enough witnesses where we
9 avoid any possibility that we wouldn't be able to seat a jury.

10 Okay. Any questions about that?

11 So also what I'd like for you all to do, and we're
12 going to create our own list, and you can just submit this as an
13 attachment to a letter jointly so that you all both understand,
14 a joint list of what you understand to be the issues that we're
15 going to discuss on March 28th. Okay?

16 I think I allowed briefing as it relates to --
17 opposition to one particular motion in limine. I think I might
18 have resolved all of the other ones, but you can include that,
19 too.

20 I also am going to want Mr. Davis to be available,
21 Mr. Cramer, for that date, the 28th.

22 MR. CRAMER: Mister?

23 THE COURT: Guy Davis.

24 MR. CRAMER: Guy Davis?

25 THE COURT: Yes. Because I want to address the issue

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1 of what he would be testifying about. I also would want,
2 Mr. Isaacson, Mr. Marks to be available. Now, if necessary,
3 they can appear by video if that's easier, so long as they
4 consent to the Court's jurisdiction. You all know what that
5 means as relates to being sworn as witnesses. Because I know it
6 can be sometimes difficult to get experts here, and I'm not sure
7 how long I would have them in terms of how many questions I
8 might have. But given what's been raised, I want them to be
9 available and I wanted you all to be aware of that. And we can
10 talk about their availability at that time.

11 But, again, what I would like for you all to do again
12 is to submit to me what you understand to be what we will be
13 discussing. I will give you all a week to provide that to me in
14 a joint letter. It can simply be sent to my deputy.

15 Mr. Pomerantz.

16 MR. POMERANTZ: Thank you, Your Honor.

17 As long as we're talking about issues to take up on the
18 28th, if I could put two additional issues on your radar and on
19 the defense radar.

20 The first issue is -- they both relate to how Your
21 Honor intends to conduct a trial. The first one relates to
22 adverse or hostile witnesses. There are on our side seven to 10
23 witnesses who are current or former Zuffa employees. We want to
24 be able to address with the Court our ability to lead them in
25 our case-in-chief. I'm sure there are witnesses -- in fact, I

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1 think the defense represented that the -- they would like the
2 opportunity to lead the named plaintiffs. So we'd like to take
3 that up with the Court.

4 And the second issue we'd like to take up with the
5 Court is just to confirm that when the plaintiffs put on their
6 case-in-chief, that if they call a current Zuffa employee, they
7 call Mr. White, that we conduct our examination. They conduct
8 their, quote/unquote, cross. Then we redirect, but then the
9 defendants have the right to call Mr. White in their
10 case-in-chief; that we're not going to wrap everything all up at
11 once.

12 THE COURT: Yes, I don't usually do it that way,
13 Mr. Pomerantz.

14 MR. POMERANTZ: Okay. Perfect.

15 THE COURT: Usually the witness appears once. Now, if
16 they're called back, it may be for particular reasons that come
17 up in the context of the trial, but the way that it would work
18 is let's say, for example, Mr. White. I will let you call him
19 in your case-in-chief, treat him as a hostile witness, for
20 example. And then they would be able to do their cross of him,
21 right. Then when that's over, right, they could direct.

22 Now, we just have to have a point at which that's known
23 because, obviously, if their direct moves into a new area which
24 they would be allowed to do, they have to then start asking
25 open-ended questions.

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1 MR. POMERANTZ: This is the precise concern, Your
2 Honor. It's our position that the cross-examine -- we'll use
3 Mr. White as an example. That the cross-examination should be
4 limited in scope to that which has been asked in our
5 case-in-chief.

6 And the other issue I'd like to highlight for the Court
7 is to the extent -- we'll focus on Mr. White as an example. To
8 the extent that the defense is permitted to then question him on
9 direct with nonleading questions, I would submit to the Court
10 that that creates a potential for confusion. And more to the
11 point, it may be super inefficient in the sense that it gives
12 the defense an incentive to elongate or increase the duration of
13 that direct examination, especially for someone like Mr. White
14 who's local.

15 So we submit that those should be treated separately.
16 If they want to call Mr. White in their case-in-chief, by all
17 means they should have that right --

18 THE COURT: Mr. Pomerantz, I guess I'm not
19 understanding what the issue is. I mean, these issues about
20 hostile witness and open-ended questions or leading questions, I
21 mean, this is mostly lawyers speaking. I don't know that it's
22 going to be confusing for the jury. The lawyers -- you all are
23 experienced. The moment I will say or you'll say, "I'm
24 switching to the direct portion of my examination," we will all
25 know what that means, which is typically how that's done in my

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1 cases. I indicate that. "Have you finished your cross?" And
2 then, "Are you going to switch, you know, Mr. Yates or
3 Mr. Isaacson, or, you know, Ms. Phillips, to the direct
4 portion?" They say yes. Now they're asking open questions.

5 So I guess I'm not sure what you anticipate. And you
6 can certainly object if you think they lead or if you think that
7 they're going outside the scope of the particular, sort of,
8 frame that we're talking about. But I think we can manage it
9 that way. Why couldn't we do it that way?

10 MR. POMERANTZ: So if I understand, Your Honor, you
11 intend to allow the defense to call a witness -- a witness will
12 only be called once in this trial.

13 THE COURT: Yes.

14 MR. POMERANTZ: Okay. And so then the question then is
15 how do we minimize the interruption at trial with regard to the
16 issue of whether somebody is a hostile witness. We take the
17 position we should be able to cross --

18 THE COURT: Oh, well, you all will know that before. I
19 mean, that's not something -- we'll go through the list. I'm
20 not going to decide that just on the moment. I mean, the
21 reality of it is in a case like this, unless you all tell me
22 otherwise, I think the witnesses that may be associated with the
23 opposing side, if it's an employee or not, should be treated as
24 a hostile witness, right, I mean. I think in a case like this
25 that has been so contentious, the record bears that out, right.

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1 And so I don't have any -- wouldn't have any concern,
2 for example, of the plaintiffs declaring or finding Mr. White to
3 be a hostile witness. I mean, that seems to me to be fairly
4 straightforward here.

5 MR. POMERANTZ: I would agree with you as to Mr. White.
6 I'm not sure my colleagues on the defense side would agree with
7 you as to every witness that we think is a hostile witness. So
8 if I can give an example.

9 There is a former Assistant General Counsel named
10 Michael Mersch who was deposed in this case. Mr. Mersch was a
11 long-time Zuffa employee. He is no longer a Zuffa employee. In
12 my estimation having read the deposition, he is identified with
13 Zuffa. He was asked in his deposition, "Mr. Mersch, can you
14 describe the champions clause in the contracts, the fighters
15 contracts?" And his response was: "Champions clause? I don't
16 know what you're talking about. I've never used that phrase. I
17 don't know what that phrase is."

18 And then he was confronted with an document, an e-mail
19 that he sent, in which he said -- sent an e-mail which he said,
20 "We are going to enforce the champions clause."

21 It was very clear that he, Joe Silva, the matchmaker,
22 are very much company men. And so we want to avoid a fight in
23 the middle of trial as to whether those witnesses are hostile
24 witnesses.

25 THE COURT: So let me say this. Any current or former

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1 employee of Zuffa can be treated as a hostile witness. Any
2 current or former fighter, right, or someone affiliated or
3 connected with the class can be treated by the defense as a
4 hostile witness.

5 So that's the way that I look at it in this case. That
6 I think seems to be, again, fairly clear from the record. If
7 you want to make a special argument for someone who should be
8 treated as a hostile witness, you all can do that with respect
9 to these individuals. But I am going to essentially assume and
10 will finalize that list that if it's a former or current Zuffa
11 employee, they will be treated as a hostile witness. If it's a
12 fighter or someone who's associated with the fighters or the
13 fight class, bout class, they will get to treat them as a
14 hostile witness when they're called.

15 MR. POMERANTZ: Your Honor answered my question. Thank
16 you.

17 THE COURT: Uh-huh.

18 Mr. Cramer, did you have something else you wanted to
19 add?

20 MR. CRAMER: There is a stipulation before Your Honor
21 on the motion to dismiss in the Johnson case.

22 THE COURT: Yes, I'll grant that. I know you all are
23 going to be busy.

24 MR. CRAMER: Thank you.

25 THE COURT: Let me look at my list here. I think we've

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1 done everything that we need to. The one thing I will also
2 remind you is it's really important I want on the 28th for you
3 all -- I know this is a bit of an added expense, but bring the
4 technical people who are going to be involved with the trial
5 with some samples of exhibits and technology, video clips,
6 whatever, so we can test some of that out. You know, we
7 generally, knock on wood, have had good luck, but sometimes we
8 don't. I don't want to wait until a week or so before because
9 if we have to fix something, we need a few weeks to do that. So
10 I'd rather you all brought someone then to make sure you test
11 all of the different formats and things that you're going to
12 want to do.

13 All right? Any questions about anything in terms of
14 what we need to do moving forward?

15 Okay. Wow. I know it's been a long day. I appreciate
16 all of your time today. I know it's been a long day, but I
17 think we've gotten a fair amount accomplished today. And I look
18 forward to the submissions that you all will be sending to me.

19 We will be adjourned. I'm going to stay on the bench
20 for a few minutes. Thank you.

21 (Whereupon the proceedings concluded at 5:29 p.m.)

22 ---oo---

23 COURT REPORTER'S CERTIFICATE

24
25 I, PATRICIA L. GANCI, Official Court Reporter, United

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1 States District Court, District of Nevada, Las Vegas, Nevada,
2 certify that the foregoing is a correct transcript from the
3 record of proceedings in the above-entitled matter.

4

5 Date: March 6, 2024.

6

/s/ Patricia L. Ganci

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Patricia L. Ganci, RMR, CRR

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